The ANTITRUST BULLETIN

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RECENT DEVELOPMENTS IN ANTITRUST ENFORCEMENT

by

LEE LOEVINGER*

One year ago I appeared before this distinguished and elite group to deliver what was then expected to be a swan song with relation to my active antitrust participation. The curious surprises that fate has in store for us and the verity of Bobby Burns' sage observation on the plans of men and the lower animals could not be better illustrated than by the events that have happened to me since then. Indeed, the circumstances that have thus drastically affected my own life may well be relevant to the assigned topic of this speech which is "Recent Developments in Antitrust Enforcement."

The conventional approach to this topic is to review carefully and in detail the decisions of appellate courts that have been rendered since the last such discussion. This seems unnecessary on this occasion. All of you follow the development of antitrust law in the courts; and it would be futile and foolish to attempt to improve upon either the reporting service of Law Week, C.C.H. and the advance sheets, or the analyses and discussion available to you both in publications and in your own offices. It may be more relevant and important to indicate what I consider to be the most important development in Antitrust, as in other law enforcement, during the past year.

The most important development in the enforcement of the antitrust laws since your last meeting has undoubtedly been the election of John F. Kennedy as President of the United States. This has resulted in the infusion of a new spirit of energy and dedication

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* The recently appointed Assistant Attorney General in charge of the Antitrust Division.

Ed. Note: Delivered to Antitrust Section, American Bar Association, Washington, D. C., April 7, 1961.

throughout the public service. Beyond this that historic event has brought to the highest levels of government administration and law enforcement a new understanding and a firmer faith in the principles upon which antitrust is founded than there has previously been for many years.

This may most usefully be illustrated for you by suggesting some of my own views. Perhaps these may also serve to lay at rest a few ancient shibboleths of the antitrust bar. The first is the notion that violation of the antitrust laws, whether intentional or not, is merely a normal business risk and really quite respectable. This is related to the feeling that has heretofore been tacit but pervasive that it is inappropriate to have criminal sanctions in the antitrust laws, and that, in any event, these were to be applied only to corporations and not to individuals. In this view even deliberate violations of the antitrust laws were, at worst, venial offenses of no more moral significance than a parking ticket.

It may be hoped that the Philadelphia electric cases, for which the preceding administration of the Antitrust Division is to be given all due credit, have helped to dispel this misapprehension. In any event, it should now be clear that a deliberate or conscious violation of the antitrust laws is not a mere personal pecadillo or economic eccentricity, but a serious offense against society which is as immoral as any other act that injures many in order to profit a few. Conspiracy to violate the antitrust laws is economic racketeering which gains no respectability by virtue of the fact that the loot is secured by stealth rather than by force. Those who are apprehended in such acts are, and will be treated as, criminals and will personally be subjected to as severe a punishment as we can persuade the courts to impose.

In the second place, the Antitrust Division is not receptive to pleas for exceptions, exemptions or special treatment of any company or industry. We have been told frequently and are quite well aware that every industry and situation is unique, that every company is most exceptional and that every case is quite extraordinary. We are also well aware that Congress and the courts have repeatedly and emphatically declared that competition, rather than collusion or monopoly, shall be the basic rule of commerce. This rule springs from the conviction that competition is the counterpart and corollary of economic freedom, and that a free economy is necessarily a com-

petitive economy. Therefore, in general we will oppose exceptions to or exemptions from the antitrust laws, sought by way of Departmental policy or judicial rulings. When asked for comment on a legislative proposal for antitrust exemption, we will take a long, hard look. With exceptions already covered by existing laws, we have seen no persuasive case for compromising any antitrust principles in special cases.

That the necessity for complying with high standards of business conduct required by the moral principles inherent in our legal codes may sometimes cause concern to businessmen and lawyers is inevitable. This is not a difficulty unique to the antitrust laws. The temptation to get rich quickly by dishonest means abounds in private life. Some succumb, but we do not listen sympathetically to the plea that theft or embezzlement, for example, should be legalized because it is so difficult to acquire wealth by other means. While the antitrust laws are, in some respects, complex, they are also flexible and reasonable. The burden of proof resting on those who seek exceptions or exemptions is not borne by the showing that it is more profitable or convenient to have no such inhibiting standards of conduct.

In the third place, the argument that the laws are basically sound but that they must be made more acceptable to business by modifications to make them both more flexible and more certain is either disingenuous sophistry or compounded confusion. To seek both flexibility and certainty in the same laws is a logical contradiction. It is equivalent to a demand that we simultaneously institute both higher and lower prices for a commodity. It is easy enough to write laws that are certain in their operation. In the antitrust field, the *per se* violations are examples of rules that provide certainty. These could well be extended by either judicial or legislative adoption of more *per se* rules. Conversely, it is easy enough to write principles that are flexible. In the antitrust field the rule of reason is an example. But it should be clear to any reasonable man that a rule which is certain is, by virtue of that very fact, not flexible. A rule which is flexible cannot be certain in prospective application.

As applied to the interpretation of law, the demand for certainty and flexibility involves polar concepts which must be reconciled and compromised. The difficult task is to write a law which provides a reasonable certainty and a reasonable flexibility respecting a single

subject matter. No doubt judgments may differ as to the precise balance between flexibility and certainty that is desirable in a given instance. There is no objective or absolute standard that can provide a clear determination of the proper balance between these competing considerations. However, it is futile and logically absurd to demand more of both flexibility and certainty from the same law at the same time.

The antitrust laws combine both flexibility and certainty to a degree that has been thought appropriate to their subject matter by several generations of legislators and judges. Perhaps they are imperfect; true perfection is probably beyond human attainment. Improvement may be possible; but it is possible only when the demand is for consistent objectives.

In the fourth place, aside from the inevitable compromise between flexibility and certainty, the antitrust laws themselves appear to me to embody a consistent conception and system. The argument is sometimes made that while the basic mandate of the antitrust laws is for competition, other parts of the laws, such as those against price discrimination, inhibit competition.

However, there is no inherent inconsistency between demanding competition and prescribing the rules by which it may be conducted. It is true that some antitrust laws forbid the use of certain competitive weapons and techniques. This does not, however, indicate that these laws require what their detractors derisively call "soft competition," or, indeed, that they are in any degree anti-competitive. There is no sport or contest conducted in civilized society without its rules. These rules invariably permit certain forms of rivalry and prohibit certain other types of action as means of winning the sport, game or contest. Of course, there are always those who decry any limitation on the mayhem or bloodshed that is permitted by the prevailing rules of organized sport. The Marquess of Queensbury rules, I am informed, were once regarded as wholly destroying the noble sport of manly combat in the ring. There will always be those who proclaim that any new rule takes all the fun and most of the competition out of a game. However, civilized society lives by its laws, and competition within civilized society is always inhibited by authoritative standards of acceptable social behavior. Were it otherwise, we would not have civilization but anarchy, and life would be quite intolerable.

There may well be reasonable debate as to whether or not a particular rule is desirable in organized sports, other games or contests, or in application to the economy by the antitrust laws. However, such an issue cannot be determined by the dogmatic assertion that all regulatory rules are inconsistent with the basic principle of competition. It is not necessary to hit below the belt in order to fight as hard as you can. The rules that prescribe the mode and weapons of competition are not anti-competitive, but, on the contrary, are quite consistent with free and vigorous competition in a civilized society.

Finally, let me express my profound conviction that competition is neither incompatible with nor a limitation upon efficiency. Indeed, competition is likely to be the stimulus which engenders efficiency. It is significant that the greatest industrial and economic development has taken place in those countries which have had the greatest degree of economic freedom and competition. Although there is not the time to offer the evidence now, I believe that an analysis of history suggests that the antitrust laws have not only permitted but have substantially contributed to the tremendous economic and political development of the United States. However, we must now bear in mind that the future is not foreordained; and that it will be determined not by our past history but by our present character and future conduct.

The great issue of this age is whether this nation, or any nation, can achieve full economic development, the satisfaction of all material needs, and the provision of adequate economic opportunities for all, together with political and civil liberty. We believe that these goals are compatible, and that the method by which they will be achieved is by observance of the principles embodied in the antitrust laws. The diffusion of economic power and the freedom which engenders competition are expressions in the economic realm of the basic faith of our culture that the individual human spirit represents the highest social value. Thus, we in the Antitrust Division are and will be dedicated to the faith that liberty, equality and prosperity are consistent social objectives. We are and will be devoted to the effort to achieve these goals by a vigorous and uncompromising enforcement of the laws prescribing competition as our basic economic condition that we may protect and preserve economic freedom in this country.

STRUCTURAL INDICIA: RANK-SHIFT ANALYSIS AS A SUPPLEMENT TO CONCENTRATION RATIOS

by

JULES JOSKOW*

The general dissatisfaction of economists with industrial concentration data is by now commonplace. The many criticisms raised have been adequately detailed elsewhere and need not be repeated here.[1] Despite these criticisms, the use of concentration data persists. The reluctance of economists to abandon one of the few empirical tools they do have available to them for market analyses is understandable. It is also commendable: concentration ratios define a primary aspect of market structure. At the same time, it is obviously desirable to develop supplementary statistical indicia of the workability of competition. This paper will examine the possibilities of employing one such supplementary indicator: a measure of shifts in the relative positions of firms within an industry.[2] The use of such analysis represents an attempt to give weight to the obvious economic fact that changes in the identity of the firms comprising the so-called top 4, 8, 12, etc., sellers is an indicator of the workability of competition.

Unfortunately, however, the availability of data relative to firm rankings has been limited to a few typically oligopolistic industries (autos, chemicals, steel), which publish financial and production data. Further, even those specific industry analyses which have been done along these lines have been restricted to the top 10 firms.

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* Ed. Note: Reprinted from *The Review of Economics and Statistics*, Harv. Univ., Vol. XLII, p. 113, No. 1, Feb., 1960.

1 For a convenient, annotated summary of such criticisms see two publications of the Chamber of Commerce of the United States: *The Significance of Concentration Ratios* (Washington, June 1957), and *The Statistical Bases of Concentration Ratios* (Washington, August 1957).

2 For earlier recognition of the implications of shifting ranks in the analysis of the competitive structure of industry see A. D. H. Kaplan, *Big Enterprise in a Competitive System* (Washington, 1954), 132 ff.; A. D. H. Kaplan and Alfred E. Kahn, "Big Business in a Competitive Society," *Fortune* (February 1953), sections 2, 5, and 10-11; and Simon N. Whitney, *Antitrust Policies: American Experience in Twenty Industries*, Vol. I (New York, 1958), 227.

The use of rank-shift information has undoubtedly been restricted by lack of the requisite data. While traditional concentration ratios are either directly available or can be computed from various published sources, data which permit a ranking of more than the relatively few companies required for the computation of concentration ratios have been difficult to obtain. This difficulty is not insurmountable,[3] and it is one of the purposes of this article to establish the potential significance of rank-shift analysis in the hope of laying the basis for wide-scale compilation and publication of the required information. In this author's view, the paucity of statistics relating to rank shifts is probably due as much to the general failure of economists to demand them as it is to difficulty of compilation.

A case study in the potentialities of this approach for adding a dynamic dimension to structural analysis—and it is the detection of the presence of competitive dynamism or monopolistic ossification that is, after all, the goal of structural analysis—is made possible by the availability to the author of rank data for 150 firms accounting for almost three-quarters of domestic shoe production.

According to the familiar concentration measures the structure of this industry in recent years has scarcely changed—with some indicators showing a slight rise, others a slight fall. The top four companies have, over the years, accounted for approximately one-fourth of the industry's physical volume of output, employment, and value of shipments.[4] Thus, by standards which would seem generally acceptable, the concentration ratio for the shoe industry might be characterized as (a) stable, and (b) low.[5]

It is not the author's intention to demonstrate by what follows either the presence or absence of workable competition in the shoe industry. Such a showing would require analysis far beyond the scope of this paper. Rather, it is intended to demonstrate that analysis of

[3] Data now in the hands of the Bureau of the Census would, if published in suitable form, i.e., properly grouped to avoid disclosure, greatly facilitate the application of the below-described techniques to other industries.

[4] *Concentration in American Industry*, Report of the Subcommittee on Antitrust and Monopoly to the Committee on the Judiciary, U. S. Senate, 85th Cong., 1st Sess., 1957, 208, 394; National Shoe Manufacturers Association, *Facts and Figures on Footwear* (annual).

[5] The top four shoe companies accounted for 30 per cent of total value of industry shipments in 1954. On this criterion, the shoe industry ranked 267 out of the 447 industries studied in *Concentration in American Industry*, op. cit.

rank shifts, in this instance, reveals that the appearance of structural stability given by the familiar concentration measures masks a significant degree of fluidity. At the same time, this study of rank shifts lends support to a thesis that a low concentration ratio is associated with the competitive shifting of position which necessarily results from the inability of any one company to obtain control of a significant share of a given market.

The basic data required for study of the rank-shift pattern as an index of the fluidity of an industry between two years consists simply of two ranked series: (1) the rank order of all companies comprising the major portion of the industry with respect to the criterion being analyzed—e.g., production, value of shipments—in the base year; (2) a comparable series showing the ranks of these same companies in the terminal year of analysis.

In the case of our analysis of the shoe manufacturing industry[6] we were able to ascertain, first, that the top 150 companies accounted for approximately 70 per cent of the physical output of that industry in 1950. Use of the top 150 companies, involving an admittedly arbitrary cut-off point, was dictated by (1) the pragmatic fact of availability of data, and (2) the more important consideration that such a cut-off point allows inclusion of firms accounting for the bulk of the industry's output. Second, we were able, both from confidential industry sources and from published data, to trace the rank shifts of those companies between 1950 and 1954. Table I sets forth in summary form the results of that investigation.

The table divides the 150 companies, by 1950 ranks, into equal size groups of ten companies (in the left-hand column). The decision to classify and study shifts among groups was motivated by two factors: first, to take advantage of the descriptive qualities of the frequency distribution; second, and more important, to minimize the impact of defects in the data, episodic circumstances such as strikes, *forces majeures*, etc., upon the rank shifts of individual companies by

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[6] A determination of the economic meaningfulness of the market definition implicit in the use of data for "the shoe manufacturing industry" as opposed to, let us say, "the high-price shoe manufacturing industry" is unnecessary to, and beyond the scope of, the presentation in this paper. Its importance in other contexts is obvious. See, for example, Ruth Mack's discussion of the impact of shoe-type, or price category, on optimum plant size. *Consumption and Business Fluctuations: A Case Study of the Shoe, Leather, Hide Sequence* (New York, 1956), 17-18.

TABLE 1. — COMPARATIVE RANK POSITION OF 150 SHOE MANUFACTURING COMPANIES IN 1950 AND 1954

1950 Rank Group		1954 Rank Group Number																	
Group No.	Rank	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	Below Group 15	Left Industry	Total
1	1– 10	9		1															10
2	11– 20	1	7	1	1														10
3	21– 30		1	5	2				1								1		10
4	31– 40		1	1	1		1		2			1	2					1	10
5	41– 50				1	1	2	1						2			1	2	10
6	51– 60					1	1	1			2	1	1		1		1	1	10
7	61– 70				1		1	1	3		1						2	1	10
8	71– 80			1	2	1		3	1	1								1	10
9	81– 90				2	1	1			1	1	1	1	1				1	10
10	91–100							1			2	1	2	1	1		2		10
11	101–110		1			1		1		2		1				2	2		10
12	111–120					1	1		1		1	2		1		1		2	10
13	121–130								1	1	1						6	1	10
14	131–140														2		5	3	10
15	141–150											1	1	1		1	6		10
Total		10	10	9	10	6	7	8	9	5	8	8	7	6	4	4	26	13	150

ignoring shifts in rank too small to move a company from one group to another.

In the horizontal row across the top of the table are rankings divided into groups of ten, and miscellaneous categories for 1954. The body of the table contains the number of companies in each of the 1950 groups allocated according to their group positions in 1954. Thus, for example, of ten companies which were in the fifth group in 1950 (ranks 41 through 50), one rose to the fourth group in 1954, one remained in the fifth group, two fell to the sixth group, one fell to the seventh group, two fell to the thirteenth group, one dropped below the fifteenth group, i.e., dropped below rank 150, and two left the industry.

It will be observed from this description of the 1954 spread of the companies that ranked from 41 through 50 in shoe production in 1950, that rank shifts, when they occur, actually fall into two broad categories. The first relates, simply, to a measurable shift in the relative size of a company;[7] the second to a departure of the company from the industry. Table I shows that of the 150 companies with which our analysis started in 1950, 137 continued to manufacture shoes in 1954, while 13 companies had left the industry by that year. Ideally, we should have liked to be able to quantify the extent of rank shift of each of these 137 surviving companies but, unfortunately, available information did not permit specific ranking below Number 150 in 1954. Consequently, as Table I indicates, the 26 companies which by 1954 had fallen below rank 150 are shown as a single group without specific quantification as to the extent of the fall each had experienced.

It should be quite evident that rank shifts yield information on the fluidity of the industry that would, in ordinary circumstances, be al-

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[7] This first group can, and probably should, be further subdivided into two sections: first, those companies whose shift in rank can be attributed to internal growth or decline (relative or absolute) and, second, those whose relative growth or decline was brought about through merger with other concerns in the industry. While the analyst would undoubtedly wish to distinguish, in the latter group, between mergers at the top and mergers at the bottom—insofar as they relate to competition—there can be little question that rank shifts thus induced carry different implications *vis-à-vis* fluidity than those in the first group. In the present case our study uncovered only two instances in which mergers or acquisitions appeared to create a significant rank shift. In these cases, the ranks of the companies involved were assumed to have remained within the same rank group for the purposes of subsequent analysis. Had more such instances appeared, however, it would have been necessary to segregate these from the first group so that separate analyses could be made.

most completely obscured by concentration ratios. Among the indicia of fluidity yielded by these data are the following:

1. Complete rigidity of ranks in this industry would be indicated by a single diagonal row of tens running from upper left to lower right in the table. To the extent there has been any movement among rank classes observations will lie above or below such a diagonal. That this latter situation prevailed in the shoe industry may be read at a glance from the table. In an attempt to quantify the extent of such variation about the diagonal the correlation coefficient between ranks was computed. Because of lack of information concerning the specific 1954 ranks of the 26 companies that fell below rank 150 in that year, the coefficient was computed between the 1950 and 1954 ranks only for those 111 companies that remained within the top 150 in the latter year. The computation yielded a correlation coefficient of +0.69. Even this figure tends to understate the degree of fluidity not only because of the exclusion of those 26 companies whose fall could not be measured in this study but also because of the "infinite" falls experienced by those 13 companies that had left the industry by 1954.

2. Of the 137 surviving concerns 33 remained in the same rank group as in 1950. (See Table 2.)

TABLE 2. — EXTENT OF CHANGE IN RANK-GROUP POSITION BETWEEN 1950 AND 1954 OF 137 SHOE MANUFACTURING COMPANIES

Extent of Change (Number of Rank Groups)	Number of companies that		
	Rose	Fell	Remained the Same
0	..	..	33
1	11	13	
2	5	7	
3	6	4	
4	7	8	
5	4	2	
6	2	1	
7	1	1	
8	..	5	
9	1	..	
Indeterminate	..	26	
Total	37	67	33

Thirty-seven companies improved their rank-group position in the industry while 67 fell to lower rank-groups. Seventy-four, possibly as

many as eighty, experienced shifts in position in excess of one rank group in either direction; the average size of the rank shift of those companies which remained in the top 150 was approximately 23 positions, or 2.3 rank groups.

3. These movements among ranks left room for 39 companies to move into the ranks of the top 150 either from among those which, in 1950, were below 150 or from outside the industry (new companies). From the totals of the columns in Table I, it can be seen that the "vacancies" created by these out-movements occurred in all 1954 rank-group classes except the first, second, and fourth. (See Table 3.)

4. Although the magnitudes of the rises and the falls were similar, they generally originated from different rank segments of the industry. The major rises occurred among those which ranked between the 71st and 120th position in 1950. The major falls appear to have occurred between the 31st and 70th rank and, presumably, from those with rank numbers higher than 120 in 1950. As might be expected, most of those companies which in 1954 dropped below rank 150 came from the lower end of the 1950 ranking, although one was as high as the third rank group in 1950.

5. Those companies which had dropped out of the shoe industry by 1954 ranked between the fourth and fourteenth groups in 1950.

TABLE 3. — NUMBER OF VACANCIES FILLED IN 1954 BY SHOE MANUFACTURING COMPANIES MOVING INTO TOP 150

1954 Rank Class	Number of Vacancies
1– 10	0
11– 20	0
21– 30	1
31– 40	0
41– 50	4
51– 60	3
61– 70	2
71– 80	1
81– 90	5
91–100	2
101–110	2
111–120	3
121–130	4
131–140	6
141–150	6
Total	39

6. The greatest stability of group membership was shown, as might be anticipated, by the first group. While company-by-company analysis of this group would reveal some single rank changes, only one of these companies showed a significant change in the only direction in which it could go in such an analysis as this—down.

There is, then, a not inconsiderable amount of circulation in the industry: over one-fourth of the firms in the top 150 in 1954 were outside of that group only four years earlier; 8.7 per cent of those in the top 150 in the initial year actually left the industry, while twice that percentage survived in the industry but not in the group; between 54.0 per cent and 58.4 per cent of the companies that remained in the industry shifted their positions by more than one rank group—all this within the relatively short period of four years.

Some frame of reference, although admittedly imperfect, is provided by national all-industry figures. *Fortune* magazine's annual "Directory of the 500 Largest U. S. Industrial Corporations" provides data making possible a rank-shift analysis for 1954 through 1957. In that period 12 per cent of the firms which were in the top 150 in 1954 dropped out of the group, an average annual departure rate of 4 per cent, in contrast with an average rate of approximately 6 per cent for the shoe industry. The shoe industry case is, actually, even more striking than this comparison indicates. Group shifts in the *Fortune* data would occur if one industry prospered relative to another, whereas the shoe industry statistics would reflect such shifts only to the extent that one sub-market in that industry prospered relative to another. The *Fortune* data would, further, reflect changes in position which are attributable to mergers; such shifts are specifically excluded from these data on the shoe industry.[8]

In sum, and at the risk of being repetitious, it should be stated that these data do not alone provide an indicator of the workability of competition in the shoe industry. They are intended rather to demonstrate (1) that the structural stability implied by the concentration data is not present to the degree indicated by the standard ratios, and (2) that—in this industry, at any rate—a low concentration ratio is

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8 For a summary of the various ways in which such an analysis tends to overstate the extent of competition which may be inferred from rank shifts among the leading firms, not separated by industry, see Corwin D. Edwards, *Big Business and the Policy of Competition* (Cleveland, 1956), 100-101.

accompanied by a not insignificant degree of fluidity, as evidenced by rank shifts.

That this technique provides no complete solution is clear; a statement of three of the more obvious qualifications nevertheless seems in order. First, application of rank-shift analysis to a specific industry will prove a more useful basis for the formation of qualitative judgments when such data are gathered for other industries. In the case of concentration ratios, our knowledge of the facts in several industries provides us with criteria for judging the ratio for any given industry. We can, consequently, characterize concentration in the shoe industry as "low"; it is infinitely more difficult to characterize a correlation coefficient of +0.69 as either "high" or "low." As data for other industries become available, however, this weakness will be overcome.

Second, rank shift data cannot be analyzed in a vacuum; they must be studied against the background of the industry to which they apply. For example, in an industry characterized by a great number of firms of roughly equivalent absolute size, minor differences in growth rates would produce wide jumps in rankings; only careful examination of the underlying data would uncover the existence of such a circumstance.

Finally, the use of rank shift analysis becomes more meaningful as comparisons are made over successive time intervals. While the introduction of information on intra-industry shifts between two points of time adds a dynamic dimension to concentration ratio information, obviously, continued study of the changing rates and patterns of such "molecular movements" over time could provide a significant expansion of that dimension.

[illegible]

MERGER LITIGATION, 1951-1960

by

CHARLES F. PHILLIPS, JR.

and

GEORGE R. HALL*

I

Innovations in anti-trust legislation have been few and far between. The most recent was the 1950 Celler-Kefauver amendment to section 7 of the Clayton Act.[1] The first ten years of the "new section 7" enforcement indicate that it is likely to have a major effect on future changes in the structure of American industry. As will be shown below litigation has been extensive and both of the enforcement agencies remarkably successful in cases prosecuted.

Prior to 1951 action against corporate mergers was rare. In the period 1914-50 the Justice Department instituted only four complaints, with but one being settled in its favor.[2] In the period 1929-50, the FTC issued thirty-one complaints, but only five orders resulted.[3]

These results were due in large part to the state of the law. Congress intentionally (or unintentionally) left outright asset acquisitions beyond the reach of Section 7 in 1914. Moreover, in deciding the *Thatcher Mfg. Co., Swift & Co.,* and *Arrow-Hart & Hegeman Elec. Co.* cases, the courts ruled that the subsequent conversion of stock acquisitions into asset holdings made the law inapplicable, even though the stock acquisitions themselves may have been illegal.[4]

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1 See 15 U. S. C., Section 18 (1952).

2 David Dale Martin, *Mergers and the Clayton Act* (California: University of California Press, 1959), p. 149.

3 *Ibid.*, p. 201.

4 *Thatcher Mfg. Co.* v. *FTC,* 272 U. S. 554 (1926); *Swift & Co.* v. *FTC,* 272 U. S. 554 (1926); and *Arrow-Hart & Hegeman Elec. Co.* v. *FTC,* 291 U. S. 587 (1934).

The 1950 amendment sought to close the loophole concerning asset acquisitions. The over-all purpose of the amended section is to cope with mergers and acquisitions which may significantly reduce the vigor of competition before the effects reach the magnitude which would justify a Sherman Act proceeding. Passage of this amendment has resulted in the initiation of extensive litigation involving corporate mergers. As Table I shows, eighty-one complaints have been instituted under the "new section 7." While not a large number of cases in an absolute sense, they represent more than twice as many cases as were filed in the previous thirty-six years of section 7 enforcement.

TABLE I

Status of Merger Litigation, 1951-1960

	Cases initiated by		
	FTC	Justice Department	Total Cases
Cases Filed	43	38	81
Cases Terminated:			
Consent Decree or Order[a]	7	11	18
Court or Commission[a] Decision	5	6	11
Voluntary Withdrawal	0	1	1
	12	18	30
Cases Pending (Dec. 31, 1960)	31[b]	20[c]	51

a. Only full commission decisions are here considered.

b. Includes two commission decisions which have been appealed to the Courts.

c. Includes one case which has been appealed to the Supreme Court.

This paper has three purposes. The first is to analyze the cases initiated by the two enforcement agencies to determine the criteria which appear to be used in deciding which mergers will be challenged. The second is to analyze the cases so far terminated as to results achieved and to ascertain present court and commission interpretation of the relevant merger criteria of section 7. The third is to assess the impact of recent merger litigation upon public policy towards competition.

It is our contention that litigation since 1951 has established a recognizable policy towards mergers. There has been sufficient consistency in the attitude of the enforcement agencies and the courts to

permit reasonable prediction of the types of acquisitions which are illegal.

II

Acquisitions have been challenged by the Federal Trade Commission or the Department of Justice in eighty-one cases between the end of 1950 and December 31, 1960. This section examines these cases to determine the criteria which appear to determine what mergers will be challenged. Rarely has a case been based on a single test.[5] Nor can a definite set of hypotheses be given without knowing the attributes of mergers the enforcement agencies have analyzed and decided not to prosecute.[6] Moreover, the past may provide little indication of the future. These qualifications aside, a sufficient number of cases have been brought to indicate a pattern of criteria.[7]

Market Shares

In every merger case filed, the complaint has dealt with the shares of the relevant markets accounted for by the acquiring and acquired companies. Market shares accounted for by the acquiring companies have ranged from a low 4% in the *Brown Shoe* case to a high of 60% in the *American Cyanamid* case. Market shares for the acquired companies have varied from 0.5% in the *Brown Shoe* case to 61% in the *Erie Sand* case. Taking combined market shares, these have ranged from 5.17% in *Brown Shoe* to 100% in *Farm Journal.*

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5 "The meaning and relative importance of competitive activities varies from industry to industry and from market to market. Since competition cannot be directly measured, no single standard is applicable to the whole range of American industries and markets." Federal Trade Commission, *Report on Corporate Mergers and Acquisitions* (Washington: Government Printing Office, 1955), p. 171.

6 Jesse W. Markham, "Merger Policy Under the New Section 7: A Six Year Appraisal," *Virginia Law Review,* May 1957, p. 521.

7 Space has prohibited the publishing of the list of cases filed and the complete tables showing the economic characteristics of these cases. However, the authors have mimeographed copies available for anyone interested. Write to authors c/o Washington and Lee University, School of Commerce and Administration.

Market shares, however, are largely irrelevant, unless the extent of the market is considered. In the majority of the eighty-one cases brought, both the acquiring and acquired firms were leaders in their respective markets, and the merger would give the acquiring firm at least 25% of the market as defined. In fifty-six of the cases where the combined market position is given, the merger would strengthen or create either the largest or the second largest firm in the relevant market.

The enforcement agencies have used relative market shares in at least four closely related ways. First, the fewness of major companies operating in the relevant market has been noted in most of the complaints. Thus the small number of integrated steel companies received emphasis in the *Bethlehem* case; the small number of significant competitors played a major role in the complaints filed against *Crown Zellerbach, Farm Journal, Erie Sand* and *Reynolds Metals*. Second, the fact or possibility of dominance in the market by the acquiring company has been discussed in the majority of cases filed. Dominance refers to the relative size of the acquiring company before (*Maryland and Virginia Milk Producers Association*) or after (*Farm Journal*) the acquisition. Third, most of the complaints have argued that the challenged merger would or had increased concentration of capacity or sales. Fourth, while every merger changes the ownership of at least one company (or part of a company), several complaints have emphasized the fact that a significant independent competitive company has been eliminated by the merger (*Brown Shoe, Bethlehem, Farm Journal, Spalding*).

Type of Merger

Sixty-six of the eighty-one section 7 cases filed by the FTC and the Department of Justice involve horizontal merger; six cases involve vertical merger; six cases involve both horizontal and vertical elements; two cases involve conglomerate merger; and one case involves both vertical and conglomerate aspects.

Geographical Market

Regarding the geographical extent of the market, forty-two section 7 cases filed have involved national markets. In such cases, the complex problem of interregional competition does not arise.

Of the remaining thirty-nine cases twenty-four involve regional or local markets, or classes of customers, and fifteen involve both national and regional markets.

Regional or local markets involve the difficult problem of outlining the relevant market area. Some complaints list various cities as the market (*Hilton, Hertz*); an urban area (*Maryland and Virginia Milk Producers, National Dairy*); a market recognized by the industry, such as the "West coast paper market" (*Crown Zellerbach*); and a market determined by high transportation costs which insulate a group of producers from outside competition (*Erie Sand, Bethlehem*).

History of Acquisitions

In over one-half of the cases filed, the history of acquisitions by the acquiring company is considered a relevant factor in the case (*Bethlehem, Crown Zellerbach, Hilton, Schenley*). It should be noted, however, that the FTC specifically denied the relevance of this consideration in its decision in the *Reynolds Metals* case. In addition, the FTC has charged in twelve cases that the series of acquisitions are themselves an unfair method of competition in violation of section 5 of the Federal Trade Commission Act (*Lauria, Foremost Dairies, Scott Paper*).

Possibility of Entry

In several instances the two enforcement agencies have argued in their complaints that the loss of one independent unit may be irremediable. In other words, an examination of the facts on past entry into the market has been used to determine the opportunities for future entry. For example, the complaints in the *Bethlehem, Crown Zellerbach,* and *Spalding* cases have used this argument.

One further characteristic of the merger cases filed concerns the product markets involved. While not properly a criterion, it should be noted that some product markets seem to be more vulnerable to challenge than others. Over three-quarters of the complaints filed involve manufacturing firms. More importantly, one-fourth of the complaints in the manufacturing area, and nearly one-half of the complaints in the trade area, concern food and kindred products.

In fact, one-fourth of the eighty-one complaints issued involved firms in the food industry.

An examination of the industries involved suggests that once a particular market is under investigation, one case may lead to another. Two or more cases have been brought against companies operating in the following specific product markets: chain groceries, vending machine concessions, automobile and truck rentals, television rights, dairy products, shoes, containers, barites, beer, baked goods, salt and petroleum products.

III

Of the eighty-one acquisitions challenged by the enforcement agencies during the past ten years, thirty cases have been terminated. (See Table 2. Three other decisions are on appeal.) Taking the thirty cases terminated, it can be seen that eighteen were ended by either consent decrees or orders; eleven by either FTC or court decisions, and one voluntarily. If we measure success in relation to what the two agencies sought in bringing the cases, they have been very successful; the results are as follows:

1. Complete divestiture was obtained in twelve cases—one was court ordered; four were FTC ordered; five were by consent decree; one was by consent order and one was voluntary.

2. Limited divestiture was obtained in fourteen cases—one was court ordered; one was FTC ordered; six were by consent decree and six were by consent order.

3. In the remaining four cases, a divestiture was denied—all four, of course, were court decisions. The Justice Department was seeking preliminary injunctions in two of these cases, divestiture in the other two.

4. Complete divestiture was obtained in all three of the cases which are on appeal and pending.

Judged by what the enforcement agencies sought in their complaints, therefore, 40 per cent of the cases terminated have been completely successful, 47 per cent partially successful, and 13 per cent unsuccessful. This statement implies, of course, that the agencies al-

ways seek exactly what they ask for when the case is brought. Such an assumption may not always be valid.

One further characteristic of the cases terminated should be noted: the time element. From the date the cases were initiated to the date of termination many months elapsed. For the Justice Department, cases terminated by consent decrees averaged slightly over fifteen months; the cases terminated by court decisions averaged nearly twenty-seven months. In only one case did the Department simultaneously file a case and a consent decree. For the FTC, the cases terminated by consent orders averaged just over fourteen months; the cases terminated by Commission decisions slightly over forty-five months or almost four years. We shall return to this time element in the concluding section.

IV

Turning to how the courts and commission reached these results, three questions are crucial: (a) what is the line of commerce or product market involved? (b) what is the section of the country or market area involved? and (c) what is the competitive impact of the merger in the relevant market?

Line of Commerce

To date both enforcement agencies have argued in favor of a narrow definition of the market or line of commerce; the approach has usually been based on certain end-use markets. In most cases Department of Justice definitions have been accepted by the courts. Judge Weber, in the *Brown Shoe* case, said that "an analysis of the maze of cases on the subject leads one to conclude that a 'line of commerce' cannot be determined by any process of logic and should be determined by the processes of observation . . . In other words, determine how the industry itself and how the users, the public, treat the shoe product." [8] The court thus concluded that "men's," "women's" and "children's" shoes were separate product lines to be considered in the decision, rejecting the defendants' contention that product lines had to be determined by grade, quality, price and use.

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[8] *U. S.* v. *Brown Shoe Company*, 179 F. Supp. 721 (E. D. Mo., 1959).

TABLE II

DECISIONS ON ACQUISITIONS CHALLENGED UNDER SECTION 7 OF THE CLAYTON ACT, AS AMENDED, BY TYPE OF DECISION AND DATE OF TERMINATION, 1951-1960 (December 31)

Acquiring Company	Acquired Property	Date of Termination
	COURT AND COMMISSION DECISIONS	
Bethlehem Steel Corp.	The Youngstown Sheet and Tube Co.	Injunction granted, 168 F. Supp. 576 (1958)
Columbia Pictures, Corp., et al.	Screen Gems, Inc.	Injunction denied, 189 F. Supp. 153 (1960)
Continental Can Co., Inc. and Hazel-Atlas Glass Co.	Hazel-Atlas Glass Co.	Divestiture denied, (D. C. N. Y. 1960)
Farm Journal, Inc.	*Better Farming*	Limited divestiture ordered, Docket 6388 (1956)
Jerrold Electronics Corp.	10 community television antenna systems	Divestiture denied, 187 F. Supp. 545 (1960)
Maryland and Virginia Milk Producers Association	Substantially all assets of Embassy Dairy, Inc.	Divestiture of assets of Embassy ordered
	All outstanding capital stock of Richfield Dairy Corp.	Acquisition of assets of Richfield and Simpson ruled valid, 167 F. Supp. 799 (1958). Upheld by U. S. Supreme Court 1960, 362 U. S. 458 (1959)
	All outstanding capital stock of Simpson Bros., Inc.	
Pillsbury Mills, Inc.	Ballard & Ballard Co. Duff's Baking Mix	Divestiture ordered, Docket 6000 (1960)
Reynolds Metals Co.	Arrow Brands, Inc.	Divestiture ordered, Docket 7009 (1960)
Scott Paper Co.	Soundview Pulp Co. Detroit Sulphite Pulp & Paper Co. Hollingsworth & Whitney Co.	Divestiture ordered, Docket 6559 (1960)
A. G. Spalding & Bros., Inc.	Rawlings Manufacturing Co.	Divestiture ordered, Docket 6478 (1960)
Von's Grocery Co.	Shopping Bag Food Stores	Injunction denied, (D. C. Calif., 1960) CCH Trade Regulation Reporter, pp. 69, 698

TABLE II (continued)
DECISIONS ON ACQUISITIONS CHALLENGED UNDER SECTION 7 OF THE CLAYTON ACT, AS AMENDED, BY TYPE OF DECISION AND DATE OF TERMINATION, 1951-1960 (December 31)

Acquiring Company	Acquired Property	Date of Termination
	CONSENT DECREES AND ORDERS	
American Radiator & Standard Sanitary Corp.	Mullins Manufacturing Co.	Consent decree ordering divestiture, 1960
Anheuser-Busch, Inc.	Miami Brewery of American Brewing Co.	Consent decree ordering divestiture, 1960
Automatic Canteen Co.	Rowe Corp.	Consent order requiring limited divestiture, 1958
Diamond Crystal Salt Co.	Jefferson Island Salt Co.	Consent order requiring limited divestiture, 1960
Firstamerica Corp.	California Bank of Los Angeles	Consent decree ordering limited divestiture, 1960
Gamble-Skogmo, Inc.	Western Auto Supply Co.	Consent decree ordering divestiture, 1960
General Shoe Corp.	Delman, Inc.	Consent decree ordering limited divestiture, 1956
Gulf Oil Corp.	Warren Petroleum Corp.	Consent order requiring divestiture, 1960
The Hertz Corp.	Several auto and truck renting and leasing companies	Consent decree ordering limited divestiture, 1960
Hilton Hotels Corp.	75% of the common stock and specific assets of Statler Hotels, Delaware Corp.	Consent decree ordering limited divestiture, 1956
International Paper Co.	Long-Bell Lumber Corp. Long-Bell Lumber Co.	Consent order requiring limited divestiture, 1957
Lucky Lager Brewing Co.	Fisher Brewing Co.	Consent decree ordering divestiture, 1958
Maremont Automotive Products, Inc.	Saco-Lowell Shops, Inc.	Consent decree ordering limited divestiture, 1960
Minute Maid Corp.	Snow Crop Division of Clinton Foods, Inc.	Consent decree ordering divestiture, 1955
Schenley Industries, Inc.	70% of outstanding stock of Park & Tilford Distillers Corp.	Consent decree limiting future acquisitions, 1957

TABLE II (continued)
DECISIONS ON ACQUISITIONS CHALLENGED UNDER SECTION 7 OF THE CLAYTON ACT, AS AMENDED, BY TYPE OF DECISION AND DATE OF TERMINATION, 1951-1960 (December 31)

Scovill Manufacturing Co.	DeLong Hook & Eye Co.	Consent order requiring limited divestiture, 1956
Union Bag & Paper Corp.	Agreement to increase holdings of Hankins Containers Corp. to 66 2/3% of authorized and outstanding stock	Consent order limiting future acquisitions of stock in Hankins, 1956
The Vendo Co.	Vendorlator Manufacturing Co.	Consent order requiring limited divestiture, 1957
VOLUNTARY WITHDRAWAL		
The Standard Oil Co. (Ohio)	Leonard Refineries, Inc.	Standard announced abandonment of merger plans, 1960
DECISIONS APPEALED (PENDING)		
Brown Shoe Co., Inc.	G. R. Kinney, Co., Inc.	Found in violation of Section 7, 179 F. Supp. 721 (1959). On appeal U. S. Supreme Ct.
Crown Zellerbach Corp.	St. Helens Pulp & Paper Co.	FTC ordered divestiture, Docket 6180 (1957). On appeal (CA 9)
Erie Sand and Gravel Co.	Sandusky Division of Kelley Island Co.	FTC ordered divestiture, Docket 6670 (1959). On appeal (CA 3)

The *Brown Shoe* decision was in keeping with Judge Weinfeld's earlier definition of line of commerce in the *Bethlehem* case. In the latter case the court decided that any products with "peculiar characteristics and uses" which make it distinguishable from all other products "make up a line of commerce under the Clayton Act." [9] This definition was also used by the Supreme Court in the *du Pont–GM* case.[10]

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[9] *U. S. v. Bethlehem Steel Corporation*, 168 F. Supp. 576 (S. D. N. Y., 1958).

[10] *U. S. v. E. I. du Pont de Nemours & Company*, 353 U. S. 586 (1957).

In the recently decided *Continental Can–Hazel-Atlas* case, the merger had many important conglomerate-type features upon which the defendants based their case. The government, however, contended that there were ten lines of commerce based upon end-use, such as the beer industry, soft drink industry, toilet and cosmetics industry. Judge Bryan dismissed each claim, saying: "Many of the propositions of fact on which the Government relies find support only in argument. Others rest on most insubstantial and evanescent evidentiary foundations. The evidence adduced by the Government is insufficient both qualitatively and quantitatively to establishing that this acquisition has violated Section 7 of the Clayton Act in any respect." [11] While this court decision may be of future importance, the case may not set precedent. "The basic defect in the Government's case," said Judge Bryan, "does not lie in its theories but in the nature and quality of its proof." [12]

The FTC too has followed a narrow definition of line of commerce in its antimerger decisions. In the case of *Crown Zellerbach*, the Commission said that the product market was coarse papers, including wrapping, bag and sack papers, and converting papers.[13] The Commission thus looked at the buyers, concluding that the narrow field was a proper market because the papers in it were sold to particular customers for particular uses. The FTC further argued, with respect to substitutes, that while some products–such as container board–might theoretically replace each other, there was little such substitution by users in actual practice.

Similarly, in the *Erie Sand* case, the Commission ruled that "lake sand has so many characteristics not shared by pit or bank sand" that it constitutes a clearly discrete line of commerce. "Each type of sand has its own customers and trading area, and customers do not, as a rule, use one sand in lieu of the other." [14] Also, in the *Spalding* case, the Commission overruled its hearing examiner, holding that higher-priced athletic goods on which members of the Athletic Goods Manufacturers Association reported were appropriate markets. Items of higher quality and durability are designed for use in regular competi-

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11 *U. S.* v. *Continental Can—Hazel-Atlas Glass Co.*, not officially reported (1960).

12 *Ibid.*

13 *Crown Zellerbach Corporation*, FTC Docket 6180, February 25, 1957.

14 *Erie Sand and Gravel Company*, FTC Docket 6670, October 26, 1959.

tion, while the lower-priced items are classified as "toys" or products not suitable for use in organized competitive games.[15]

It would therefore appear that both enforcement agencies, in trying to establish narrow product markets in section 7 cases, are seeking to draw a distinction between a Sherman Act and a merger case. The "reasonable interchangeability" test of the *Cellophane* case[16] is not being followed by the two agencies in merger cases. In the latter cases, the agencies are putting emphasis upon what customers buy from a seller and how they use what they buy, rather than upon the ability of two products to perform the same job or function.

Section of the Country

A reading of the section 7 decisions indicates much confusion results from defining or outlining the section of the country in which the products of two companies compete. Perhaps this is inevitable, for there are no set rules for determining the relevant special market. This was clearly stated in the *Bethlehem* decision as follows:

> "What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of the markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.
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> * * *
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> An economically significant area in an industry cannot be determined with the precision of a surveyor. In considering the anticompetitive consequences of a merger there is nothing sacred about the boundary lines of a state. The impact may manifest itself in an appreciable segment of a market which may coincide with a political subdivision of a state, a combination of states or the nation." [17]

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15 *A. G. Spalding & Brothers, Inc.*, FTC Docket 6478, April 20, 1960.

16 *U. S.* v. *E. I. du Pont de Nemours & Company*, 351 U. S. 377 (1956).

17 *U. S.* v. *Bethlehem Steel Corporation*, 168 F. Supp. 576 (S. D. N. Y., 1958).

In no case is the problem of determination of the relevant market more clearly seen than in the *Bethlehem* decision itself. There, six significant geographical markets were designated: (1) United States as a whole, (2) the Northeast quadrant, (3) a four-state area of Michigan, Ohio, Pennsylvania and New York, (4) Michigan and Ohio, (5) Michigan, and (6) Ohio.[18] While logically inconsistent,[19] the court's analysis indicates its willingness to make the geographical market flexible in a case-by-case approach.

In *Brown Shoe,* both the government and the defendant agreed that the relevant market area for retailing consisted of a series of local markets, while for manufacturing the market was national. The major difference between the two parties centered on the size of the local market: the government taking a single city as its unit and Brown Shoe as a metropolitan area. Similarly in *Maryland and Virginia Milk* the Court found that the "Washington Metropolitan Area" was the appropriate market for Clayton Act purposes.[20]

The FTC's attitude toward defining the relevant market can be seen in two recent decisions. In the *Crown Zellerbach* case, the Commission rejected the defendant's argument for a broad market area. Instead, the FTC said an eleven-Western-state area was the "natural market" for western producers and that purchaser preferences and shipping costs have "effectively separated" the West as a competitive area from the rest of the country.[21] In the *Erie Sand* case the FTC examiner was even more exact in defining the geographical market. The market involved, he ruled, was the southern shore of Lake Erie from Buffalo to Sandusky and extending inland twelve miles.[22]

No clear-cut criterion for defining a market has yet been developed by either the courts or the FTC. Nevertheless, these cases clearly indicate that in any area where two companies each make sales, even if only a small percentage of total industry sales, they compete with each other. The legality of a merger thus can be determined by its impact in a small geographical market and not necessarily in the

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18 *Ibid.*

19 See M. A. Adelman, 45 *Va. L. Rev.* 684.

20 *Maryland and Virginia Milk Producers Association, Inc.* v. *U. S.*, 167 F. Supp. 799 at 803, 362 U. S. 458 at 472 (U. S. D. C., D. C., 1958).

21 *Crown Zellerbach Corporation,* FTC Docket 6180, February 25, 1957.

22 *Erie Sand and Gravel Company,* FTC Docket 6670, October 26, 1959.

area where the bulk of a company's sales are made. And in trying to decide upon the relevant market, the following criteria are currently being considered: physical characteristics, uses of the products, price behavior, distributional differences, recognition or treatment by the industry or by respondent of a separate product market.[23]

Competitive Impact

A merger may contain horizontal, vertical and conglomerate elements. Horizontal mergers have been tested and treated severely. One key factor has received considerable attention: the degree of concentration, including the fewness of competitors and the market share of the merged firms.

Judge Weinfeld, in the *Bethlehem* case, found that the proposed merger would "add substantially to concentration in an already highly concentrated industry and reduce unduly the already limited number of integrated steel companies." The Court completely rejected the idea of beneficial competition between giants. "Congress . . . did not, in enacting the antitrust laws, intend to give free play to the balancing power of gigantic enterprises and leave the less powerful purchaser helpless. What Congress sought to preserve was a social and economic order not dependent on the power of a few to take care of themselves." [24]

To be sure, the *Bethlehem* case dealt with large companies. But when (a) large firms are involved, and (b) the industry is marked by relatively few competitors sharing the bulk of production or sales, merger activity will be suspect.

Concentration, of course, cannot be equated with monopoly power. Nor have recent merger decisions implied otherwise. In all of these decisions, the Commission and courts have discussed the probable effects of an increase in concentration upon market performance. In the *Maryland and Virginia Milk* case the court was concerned with market dominance and, among other things, found "Without doubt, the result was that the defendant enhanced its dominating position in the market, even though it did not attain complete control." [25] In

[23] See *Brillo Manufacturing Company*, FTC Docket 6557, May 23, 1958 and *Reynolds Metals Company*, FTC Docket 7009, March 2, 1959.

[24] *U. S.* v. *Bethlehem Steel Corporation*, 168 F. Supp. 576 (S. D. N. Y., 1958).

[25] *Maryland and Virginia Milk Producers Association, Inc.* v. *U. S.*, 167 F. Supp. 799 at 807 (1958).

the *Crown Zellerbach* decision, the Commission emphasized the elimination of a significant independent competitor. Noting that the defendant produced 51.5% and the acquired firm 11.0% of the relevant products produced in the West, the Commission stated: "One immediate result of the acquisition was to remove from the Western supplier market an important, fully integrated competitor having its own timber reserves, pulp manufacture and converting facilities and fully developed sales outlet to the trade." [26]

The effect of a merger upon price competition in an industry or market has been frequently examined. In *Maryland and Virginia Milk* the court was concerned with the fact that the Embassy Dairy, which had represented an active cut-price source of milk, had been eliminated from the market.[27] In *Reynolds Metals,* the Commission found that: "The significance of the situation is that Arrow could lower its prices and maintain them at low levels for an extended period, which it could not have done before the merger. The acquisition gave it market power which was so dramatically demonstrated." [28]

An increase in concentration, when coupled with little opportunity for future entry into a market, has been looked upon with disfavor by the enforcement agencies. The court concluded in *Bethlehem:* "The prospect of a new entrant to replace an absorbed Youngstown, either in terms of capital investment or experience, is, in the light of the history of this industry, practically nil." [29] And in the *Crown Zellerbach* case, the Commission concluded: "There is no indication that any new firm will produce a relatively broad line of the coarse paper so as to become a substantial supplier for jobbers and converters, nor is there any indication that any new supplier will offer the form of competition such as evidenced by the extra services which it had been customary for the St. Helens mill to provide. Under the circumstances, it does not appear that new entrants will measurably offset the lessening of competition apparent in this record." [30]

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[26] *Crown Zellerbach Corporation,* FTC Docket 6180, February 25, 1957.

[27] *Maryland and Virginia Milk Producers Association, Inc.* v. *U. S.,* 167 F. Supp. 799 at 807 (1958).

[28] *Reynolds Metals Company,* FTC Docket 7009, March 2, 1959.

[29] *U. S.* v. *Bethlehem Steel Corporation,* 168 F. Supp. 576 (S. D. N. Y., 1958).

[30] *Crown Zellerbach Corporation,* FTC Docket 6180, February 25, 1957.

Concerning horizontal mergers, therefore, the Commission and courts have emphasized market power as the test of legality. An increase in concentration, even when relatively small market shares are involved, may increase an already dominant market position, eliminate a significant independent competitor, change the nature of price competition in an industry, and/or change permanently the market structure of an industry, particularly when there is little opportunity for entry. These are the factors that seem important in the decisions.

Vertical and conglomerate mergers have not received decisive interpretation and thus any conclusions must be tentative. Moreover, both types of mergers lead to the most difficult economic and legal problems of antimerger policy. In vertical and conglomerate acquisitions, no direct increase in concentration may result. Vertical integration may reduce costs, thereby yielding a competitive advantage. It may also extend market control either backward toward raw materials or forward to the market. Vertical integration may result in an extension of existing market power or control to an adjacent stage. As such, competition may be increased or decreased. Only by a careful analysis of the market structure can the probable result of vertical integration be determined.

Adelman has argued that antimerger policy may confuse competition and protection, especially when dealing with vertical (and conglomerate) integration. He further suggests that *Brown Shoe* "is the most clearly protectionist." [31] Of particular concern to the court in its decision was evidence of a definite trend in the shoe industry toward ownership of retail outlets by manufacturers. The court pointed out that the acquisition by Brown of Kinney's vast chain of retail stores gives the company combined advantages (presumably of economies of scale and of integration) that nonintegrated manufacturers or retailers cannot achieve. More specifically:

> ". . . large manufacturers (including Brown) are acquiring retail outlets which purchase from them and smaller independent manufacturers are losing that market as the purchases increase. This substantially lessens competition between manufacturers and

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[31] M. A. Adelman, "The Anti-Merger Act, 1950-1960," to be published in the May 1961 issue of the *American Economic Review*.

Brown and has been, is, and is likely to continue to be an ever growing part of this result." [32]

Two other vertical merger cases have been decided. In the *Maryland and Virginia Milk* case the defendant (i.e., the producers association) controlled more than 92% of the production and sale of milk to the Washington metropolitan dealers. By acquiring Embassy Dairy, the association would also become the largest dealer in the area. Such a merger, the court ruled, would eliminate the principal outlet for milk supplied by producers who are not members of the association.[33]

The Government argued, in the *Jerrold* case, that the effect of ten vertical acquisitions was to secure for the defendant a steady customer for its own products and thus to deprive competitors of potential buyers. The court seemed to agree and concluded that the acquisitions had foreclosed between 1.5% and 10% of the market to competitors. Said the court:

"These figures indicate that Jerrold's acquisitions are approaching, if not beyond, the point where it can be said that it is a reasonable probability that they will have the prohibited effects when they are examined in the context of Jerrold's prominent position in the industry." [34]

However, because "divestiture is a harsh and drastic remedy," the court issued an injunction against future acquisitions for a three-year period.

Turning finally to conglomerate mergers, only two cases have been filed against a truly conglomerate acquisition and neither has been decided. In the *General Motors* case, the leading manufacturer of

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[32] *U. S.* v. *Brown Shoe Company*, 179 F. Supp. 721 (E. D. Mo., 1959). The court rejected the argument that the merger would not pose a serious threat to competition. "What difference can it make that Brown has only 5% of the shoe production and Kinney 0.5%, when Brown is the fourth largest firm in the U. S. and Kinney, with only 0.9% of all retail shoe sales, is the largest family shoe chain retailer? That test is, what do the facts show as to the trends in the industry and the true economic impact of this particular merger, which takes place among an industry having a few large firms that control a sizeable segment of the total, with the balance divided among hundreds of others having only minute segments?" *Ibid.*

[33] *Maryland and Virginia Milk Producers Association, Inc.* v. *U. S.*, 167 F. Supp. 799 at 806 (1958).

[34] *U. S.* v. *Jerrold Electronics Corp., et al.*, 187 F. Supp. 545 (1960).

automobiles, buses and locomotives was challenged for acquiring a company producing over one-half of the nation's off-highway earth-moving equipment.[35] In *Procter & Gamble,* the country's largest producer of soap and detergent products was charged with acquiring a dominant company in the distribution of household liquid bleach—a field in which Procter & Gamble was not previously represented.[36]

In a third case, *Scott Paper,* both conglomerate and vertical acquisitions were challenged. Recently, the Commission ruled that Scott must divest itself of the facilities acquired. Concerning the two conglomerate acquisitions challenged, the Commission argued that the facilities of the acquired companies could be converted to the manufacture of products of Scott. "The acquired properties became stepping stones to expand production facilities sooner than would have been the case with entirely new construction." Such a situation would enhance Scott's already dominant market position.[37] The decision has been appealed to the courts.

From a reading of the decisions, we can recognize three different hypotheses of ways in which competition may be lessened.

1. An acquiring company may significantly increase its market power and thereby increase or obtain an appreciable influence on the competitive behavior of the industry.

2. An acquiring company may remove a significant independent competitor, thereby increasing industrial concentration and decreasing the opportunities for other companies to compete successfully.

3. An acquiring company may extend its market control to an adjoining stage, thereby endangering the competitive opportunities of smaller or nonintegrated competitors.

Of course, one acquisition may lessen competition in all three ways. More often, however, the first two hypotheses have been argued in cases involving horizontal mergers, the third in cases involving

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[35] *U. S.* v. *General Motors Corporation,* complaint filed October 16, 1959 (S. D. N. Y.).

[36] *The Procter & Gamble Co.,* FTC Docket 6901, September 30, 1957. On June 17, 1960, the initial decision by hearing examiner ordered complete divestiture. The case is pending before the full Commission.

[37] *Scott Paper Co.,* FTC Docket 6559, December 23, 1960.

vertical, and perhaps conglomerate, acquisitions. All three hypotheses are similar; each is based on the idea that any merger which increases market power is illegal.

V

Putting together the criteria used by the enforcement agencies and the courts in merger cases we can make some generalizations about the kinds of acquisitions that will be declared illegal. If two large firms wish to conclude a horizontal merger; if the industry is one with a long record of mergers; and if a national market is involved, it is almost certain that the merger will be challenged. If the geographical market involved is a local or regional one the probability of challenge is less but still high. If the union is not a horizontal but a vertical or a conglomerate merger then there is a much lower probability of challenge.

When the case gets to court, the prosecution will probably argue for a narrow definition of the market based on the end-uses of the products the two firms produce. The claim will be that for some uses the products of the two firms can be substituted. The prosecution also probably will argue for a narrow geographical definition of the market. The main argument, however, will center around the effect of the merger on the market power of firms in the industry. Market power—the ability of a firm to control price, output, or to change the nature of competition—will be emphasized. The effect on concentration of output and the probability of entry also will be considered.

Finally, the courts and the Commission can be expected to accept these arguments, although often with some modification. Nor, in most cases, have these two bodies hesitated to order divestiture when they have found violations of section 7.

In short, we conclude that the history of merger litigation in the last ten years establishes that the FTC and the courts will strike down any merger where there is a reasonable possibility of an increase in market power. This is not to claim that a workable and completely satisfactory test of market power has been formulated. The lack of adequate empirical data and the limitations of economic theory are among the factors that have precluded the attainment of a universally acceptable definition. All the same, the cases show that the Com-

mission and the courts use a market power standard and are striving to formulate an operational definition of the permissible amount of control over prices or outputs. What effect has this approach had on public policy towards competition?

The first effect is simple but important. A great many mergers are being challenged in the courts and it is much more difficult today for large firms to expand by uniting with other firms. Past mergers have been of great importance in shaping the present size distribution of American industry.[38] Historically mergers have been one of the major ways in which large firms have achieved dominant positions in their markets. Yet, as noted in the opening section of this paper, through 1950 antimerger litigation played a minor role in our procompetitive program. In the past ten years, however, as a direct result of the Celler-Kefauver amendment, eighty-one cases have been filed by the Department of Justice and FTC under section 7 of the Clayton Act. Thirty cases have been terminated; the majority of the decisions have been favorable to the prosecution.

Another effect has been to increase the stress upon market power in anti-monopoly policy. In Sherman Act litigation, market power has not played the dominate role. Other factors, such as the way power was obtained and the extent to which the behavior of firms can only be explained by conspiracy must be considered in addition to market power. In section 7 cases, however, the courts and Commission have definitely adopted the criterion of market power as the relevant test of horizontal mergers.

Any interpretation of section 7 must depend upon the meaning given to the phrase, ". . . the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly." Several possible interpretations of this phrase can be imagined. One could consider the effect of the merger on the economic performance of the firms involved, or on the industry. That is, one could be concerned with whether the merger would likely lead to lower prices, better products, more innovation. Another interpretation might be to regard competition as being affected only when the two firms produce products which are very close substitutes over a wide range of uses or a wide geographical area. Neither of these two approaches

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38 See J. F. Weston, *The Role of Mergers in the Growth of Large Firms* (Berkeley: University of California Press, 1953).

has been applied. Instead the test has been one of whether the structure of the market (i.e., the concentration of output, the number of important firms, etc.) would be affected. Markets in this context have been defined on narrow product and geographical lines.

This strict treatment of horizontal mergers has often been advocated by economists and others. The argument is that if competition is to be preserved market power must be limited.[39] Is such a goal desirable in light of the need for both private firms and the economy as a whole to expand productive capacity? The answer would seem to be yes. Such a standard may well close the merger route for a particular firm, thereby limiting expansion. Nevertheless, the expansion of a firm by merger is less competitive in its effects than would be expansion by new internal investment. As Kaysen and Turner have put it, "This is obvious: new investment adds to supply and capacity; the merger does not immediately, though it may lead to such addition in the long run. . . . The anticompetitive effects of horizontal mergers in situations of expanding demand where one of the firms or the combination has market power hardly need be argued."[40]

With respect to vertical and conglomerate mergers, conclusions must be highly tentative. Few strictly vertical acquisitions have been challenged and no decisions have been rendered in the two conglomerate merger cases filed to date. In both situations, the stress of the argument has been upon market structure, as opposed to market performance.[41] Such an emphasis would seem desirable from the standpoint of developing a strong procompetitive policy.

This brings us to a perennial problem of all antitrust litigation—the length of the majority of cases.[42] In cases where the market

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39 C. Kaysen and D. F. Turner, *Antitrust Policy* (Cambridge: Harvard University Press, 1959), especially pp. 127-136.

40 *Ibid.*, p. 135.

41 "If the efficiency argument were a *complete* defense, Justice feels Section 7 might be wiped off the books, since almost invariably it is easier and quicker to buy know-how and management than to develop it from scratch. The 'efficiency' or 'economies' defense stands up, trust busters assert, only on those cases where defendants can prove that the efficiencies or economies could not be obtained except by the challenged merger." R. A. Smith, "What Antitrust Means Under Mr. Bicks," *Fortune*, March 1960, p. 266.

42 Taking a few examples, from the date the case was initiated to the date of termination, the following number of months elapsed: (A) Department of Justice

definitions are complex, the issues are not readily resolved. A reading of the merger cases filed, however, leads us to believe that in most cases satisfactory evidence can be gathered without significant delay. The solution to the problem of cases that last too long largely waits upon larger appropriations for the two enforcement agencies. An effective procompetitive policy cannot be maintained with staffs burdened with too many cases. This solution, however, has been well discussed for years and needs no further elaboration here.

One further suggestion for improving section 7 enforcement: the FTC should be given power to seek preliminary injunctions in monopoly cases. Presently, the Commission lacks power to prevent anticompetitive practices until completion of adjudication. Particularly in merger cases does this cause troublesome problems. To be sure, the Department of Justice has not had notable success in cases where preliminary injunctions have been sought. In twelve such cases, only two injunctions have been granted and five denied. The courts have been reluctant to interfere in this manner if it appears that the trial of the issues will require an extended period of time.[43] Nevertheless, if merger litigation continues at its present pace and as the interpretation of section 7 progresses, use of preliminary injunction may well become more important. Particularly is this true if the problem of lengthy cases can be solved. The essence of the problem is that just as it is difficult to unscramble an omelet so it is hard to unscramble assets when a remedy is to be handed down.

Finally, pre-merger notification would be desirable, although not necessary. The principal advantages of such a requirement are that it would provide a systematic reporting mechanism to the Department

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cases—*American Radiator,* 56; *Continental Can—Hazel-Atlas,* 51; *Schenley,* 26; *Firstamerica,* 17; *General Shoe,* 11; (B) FTC cases—*Pillsbury,* 103; *Spalding,* 53; *Gulf,* 37; *Reynolds,* 25; *Diamond Salt,* 14.

[43] In the *Brown Shoe* case, the court refused to issue the injunction, stating in its opinion: "There is no way to determine how long this case will take before the decree becomes final. The merger depends on economic and stock market factors. They are now favorable to consummation of the merger. On the day of final judgment they may be such as to make the merger impossible. If there is a final judgment in favor of defendants, and economic and market conditions at that time are such as to make the merger impossible, plaintiff would have the victory in fact but not on the record." *U. S.* v. *Brown Shoe Company* (E. D. Mo., January 13, 1956). Similarly, in the *Continental Can—Hazel-Atlas* case, the court refused to issue a preliminary injunction, stating that to do so would be a "drastic remedy." *U. S.* v. *Continental Can—Hazel-Atlas* (S. D. N. Y., September 13, 1956).

of Justice and FTC concerning proposed acquisitions, and would permit these agencies the opportunity to challenge the legality of a questionable transaction before it became an accomplished fact. Equally important, the notification requirement would provide concrete data on what mergers are taking place. Such a statistical record is currently lacking, thus making it practically impossible to determine the effect of mergers upon the economy.

In the past ten years, a merger policy has been added to the long-standing goal of the United States to maintain a competitive economy. Trends as to the directions that this new policy will take are evident. For most big manufacturing firms, merger policy may have closed the door to horizontal growth through mergers. The objective of an effective public policy concerning acquisitions should be to halt excessive concentration of power resulting from external, as opposed to internal, business growth. Measured by this objective, evidence suggests that our merger policy is moving in the right direction.

ANTITRUST NEWSLETTER

Supreme Court

Dkt. 50—*Noerr Motor Freight, Inc.* v. *Eastern Railroads Presidents Conference,* 273 F. 2d 218 (3d Cir.), petition filed March 3, 1960. Petition granted April 18, 1960. Oral argument presented December 12-13, 1960. Reversed February 20, 1961.

Noerr's complaint alleged that the activities of the railroads and its public relations agency in soliciting public support for or opposition to state legislation affecting its competitive position in the long haul freight business violated Sections 1 and 2 of the Sherman Act. The railroads counterclaimed alleging acts on the part of truckers of substantially the same character and nature. The District Court dismissed the counterclaim and found that the "fomenting of government restriction [by the railroads] * * * increasing the cost of operation and/or preventing the carrying of greater loads" (155 F. Supp. 768, 833) by the truckers amounted to a violation. An injunction restricting lobbying activities was issued and damages awarded predicated on a theory of dual injury to the truckers' good will, *i.e.,* that of their respective customers and that of the public. A divided Circuit Court affirmed on the theory that the railroads had acted with the extra-legislative purpose and effect of impairing the good will of the trucking industry. Judge Biggs dissented on the theory that legislative restraints were not such as are cognizable under the Sherman Act, irrespective of their effect. Observing that neither the District nor Circuit Court opinions specified which section had been violated, Judge Biggs questioned the constitutionality of the injunction as well as the method utilized to calculate damages.

Writing for a unanimous Court, former Senator Black reversed, holding that no violation of the Sherman Act could be predicated upon mere attempts to influence the passage or enforcement of laws even if the parties intended to injure a competitor.

Dkt. 55—*United States* v. *E. I. duPont de Nemours and Company,* 177 F. Supp. 1 (N. D. Ill., 1959), petition filed March 11, 1960. Probable jurisdiction noted May 23, 1960. Motion of Clara Blum to file brief, as *amicus curiae,* granted February 20, 1961. Oral argument presented February 20-21, 1961.

This action stems from the District Court's opinion regarding relief which, in turn, was necessitated by the mandate in the decision of the Supreme Court which adjudged duPont's acquisition and retention of 23% of General Motors common stock to be a violation of Section 7 of the Clayton Act (353 U. S. 586). The District Court, upon remand, held that duPont could continue to hold the General Motors stock provided that certain devices were imposed for the purpose of insulating such ownership from its natural and usual results.

In a case which it characterizes as "a landmark in the history and development of the antitrust laws," the Government argues that divestiture is the only remedy available once, as here, the acquisition has been held to be illegal or, in the alternative, that the insulating devices adopted by the District Court are inadequate.

Dkt. 73—*Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.,* 273 F. 2d 196 (7th Cir.), petition filed April 25, 1960. Certiorari granted June 6, 1960. Motion of Parmelee Transportation Co. for leave to file brief, as *amicus curiae,* granted October 10, 1960. Motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae,* granted October 17, 1960. Oral argument presented December 7, 1960. Reversed January 16, 1961, 364 U. S. 656.

The Court of Appeals affirmed the District Court's dismissal of a treble damage action based on defendant's alleged Sherman Act combination and conspiracy to control the manufacture, sale, use and installation of gas burners and furnaces on the ground that the complaint failed to allege injury to the public in the form of any appreciable lessening of competition in the sale of gas burners or furnaces, or by the public's deprivation of a product of overall superiority. Petitioner asserted that the first issue was settled by *Klors* (359 U. S. 207) and the second by *Kiefer-Stewart* (340 U. S. 211).

The *per curiam* reversal contains extensive quotations from *Klors* but concludes:

> ". . . to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private

treble damage action, that plaintiff was damaged thereby are all the law requires."

Dkt. 203—*Eli Lily and Company* v. *Sav-On-Drugs, Inc.*, 31 N. J. 591, 158 A. 2d 528 (1960), appeal filed June 30, 1960, probable jurisdiction noted and case transferred to summary calendar October 17, 1960. Petition of State of New Jersey to be named as party appellee granted February 20, 1961.

From the New Jersey Supreme Court's *per curiam* affirmance of the Superior Court's dismissal (57 Super. 291, 154 A. 2d 650) of its action for injunctive relief under the Fair Trade Law, Lily appeals. The dismissal was premised on a finding that Lily was "doing business" in New Jersey and, since it had not registered as a foreign corporation, was ineligible to sue for the enforcement of a contract in New Jersey.

Lily contends that Article I, Section 8 of the United States Constitution forbids the application of state qualification statutes to foreign corporations engaged in interstate commerce; that even if it were "doing business" in New Jersey, no state may not constitutionally require a foreign corporation to secure its approval to transact interstate business. Furthermore, even if the constitutionality of the New Jersey qualification statute be upheld, the no-suit sanction also offends the commerce clause.

Dkt. 425—*United Shoe Machinery Corp.* v. *Hanover Shoe Co.*, 281 F. 2d 481 (3d Cir., 1960), petition filed September 20, 1960. Petition denied November 21, 1960, 364 U. S. 901. Petition for rehearing denied January 9, 1961.

Hanover instituted a Section 2 action in 1955 alleging damages in the trebled amount of $5¼ million by reason of United's monopolistically excessive rental and royalty charges. Such damages constitute excess charges as opposed to "loss of profits." Hanover contended that it suffered injury at the moment it paid the excess costs, while United argued that all alleged excess costs were "passed-on" by Hanover to its customers and, hence, it sustained no injury. A separate trial on the issue of whether such excessive charges constituted an injury to plaintiff's "business or property," as that term is used in Section 4 of the Clayton Act, resulted in judgment for Hanover. (185 F. Supp. 826 (M. D. Pa., 1960).)

On interlocutory appeal, the Circuit affirmed *per curiam.*

Citing the oil jobber line of cases, United contended that the concept of injury is negatived if there is proof of passing-on; that only where there is proof that the illegal exactions were absorbed by plaintiff should recovery be permitted.

Dkt. 526—*United States* v. *Parke, Davis & Co.,* 1960 Trade Cases, ¶69,776 (D. C. D. C.), appeal filed November 10, 1960. Order vacated and case remanded January 23, 1961.

The Government appealed from the District Court's refusal to adjudicate, in conformity with the Supreme Court's holding (362 U. S. 29), that Parke, Davis had violated Section 1 of the Sherman Act. After the Supreme Court's reversal of the District Court's dismissal of the Government's complaint in the underlying action, Parke, Davis offered evidence to the District Court designed to show that there was no need for the relief sought in the complaint, *viz.,* an injunction. The operative portion of the resulting order was: "ORDERED that the injunctive relief sought by the Plaintiff is denied." The Government appealed only from the refusal to adjudicate liability, not with respect to the denial of injunctive relief. The continued effectiveness of private enforcement of the antitrust laws as well as of its own enforcement powers, asserted the Government, were placed in jeopardy by this decision. Appellee asserted that the Government failed properly to raise in the proceedings below the only point presented on appeal.

The *per curiam* opinion not only held that the Government was entitled to judgment on the merits but also directed the District Court to retain jurisdiction of the case "for future action in the event the Government applies for further relief." This latter holding was made notwithstanding the fact that no appeal was taken from the denial of injunctive relief.

Dkt. 556—*Turpentine & Rosin Factors Inc.* v. *United States,* 1960 Trade Cases, ¶69,866 (D. Ga.), petition filed November 30, 1960. Motion to affirm granted and judgment affirmed February 20, 1961.

Appellant sought review of the District Court's refusal to modify a provision in a 1951 consent decree (1951 Trade Cases, ¶62,929), requiring it to furnish certain pricing information to the Department of Agriculture. Appellant contended that the purpose of this provision was to nullify the effects of an alleged price-stabilizing scheme

effectuated through a trade association and that since said association and all other defendant competitors had passed out of existence, the provision in question had outlived its usefulness and, in fact, now worked a competitive hardship on it. The Government cited *Swift* (286 U. S. 106) in opposition.

Dkt. 575—*Kentucky Rural Electric Cooperative Corp.* v. *Moloney Electric Co.,* 282 F. 2d 481 (6th Cir., 1960), petition filed December 9, 1960. Certiorari denied February 20, 1961.

When respondent cancelled its distributorship agreement with petitioner pursuant to the terms of which the former sold certain of the latter's electrical equipment to its members, KYREEC instituted a treble damage action in which it alleged price discriminations in violation of Section 2(a) of the Clayton Act, as amended. Moloney ultimately asserted in its amended answer that its payments of upwards of $350,000 to the cooperative for services rendered over a ten-year period were unlawful under Section 2(c) of the Act and rendered the contract unenforceable. The District (175 F. Supp. 250) and Circuit Courts agreed with Moloney and KYREEC sought review.

Dkt. 631—*Jerrold Electronics Corp.* v. *United States,* 187 F. Supp. 545 (E. D. Pa.), appeal filed January 5, 1961.

The initial complaint challenged as violative of Sections 1 and 2 of the Sherman and 3 of the Clayton Act, Jerrold's former practice of selling its electronic equipment only on a full system basis and only in conjunction with a service contract. Subsequently, the Government amended the complaint to challenge six vertical acquisitions as violative of Section 7 of the Clayton Act. All of the acquired companies were disposed of prior to judgment. The District Court held that: although lawful in its inception, Jerrold had failed to prove the continued reasonableness of its tying arrangements and, hence, sustained the Sections 1 and 3 charges; that, except as to one of the five corporate subsidiaries joined, the Government had not made out the attempted monopolization charge; and that, although the available evidence did not warrant a finding that Jerrold's acquisitions had the proscribed competitive effect, they "were approaching, if not beyond the point" where they would. The Court's findings on the Section 7 question are ambiguous and counsel for both parties were criticized for the state of the record on this point.

Petitioner contends that the burden of proving the unreasonableness of the tie was not its; that the Government had not proved a "substantial" lessening of competition as a result of the operations of the restrictive provisions; that the evidence would not support a finding and the Court did not find that its acquisitions had the statutory effect; and that the granting of injunctive relief in the Section 7 charges in the absence of a finding of illegality was unwarranted.

Dkt. 658—*Union Leader* v. *Newspapers of New England*, 284 F. 2d 582 (1st Cir.), petition filed January 17, 1961.

To fill a void created by a union shutdown of the Haverhill Gazette, petitioner invaded the market with a daily newspaper, The Journal. Subsequently, the Gazette rejected petitioner's offer to buy and accepted that of a combination of Massachusetts publishers. Thereafter, the two papers engaged in "a life and death struggle." Prior to the settlement of the strike, the Journal made secret rebates to a certain group of its advertisers which agreed not to advertise elsewhere. "[A]fter it had been put in peril of insolvency," the Gazette countered by granting discriminatory discounts. Plaintiff instituted a Sherman Act suit against NNE, its members and the Haverhill Gazette, charging violations of Sections 1 and 2 of the Sherman Act and a Section 7 Clayton Act suit against Haverhill. The Gazette counterclaimed that plaintiff had itself violated Sections 1 and 2 of the Sherman Act. The District Court upheld the counterclaim on both counts and, in addition, adjudged a Section 2 violation with respect to the Gazette only. 180 F. Supp. 125. The Circuit Court reversed, but did not remand, that part of the opinion which adjudged a Section 2 violation against the Gazette. The Appellate Court held that defendants' price discriminations, unlike those of the plaintiff, were "defensive" and did not reflect an intent to monopolize.

Petitioner contends that the effect of this decision is to permit a monopolist the right to violate the antitrust laws for the purpose of preserving its monopoly. It further contends that since the record reflects that it was the Gazette which initiated the practice of granting discriminatory concessions that its conduct cannot be characterized as defensive. Lastly, petitioner asserts that by its acts NNE, the combination of newspaper publishers which purchased the Gazette, evidenced "dubious motives," *viz.,* to exclude the Journal—and hence

violated Section 2 of the Sherman Act and Section 7 of the Clayton Act.

Dkt. 682—*Western Auto Supply Company* v. *McElhenney,* 1960 Trade Cases, ¶69,850 (4th Cir.), petition filed January 30, 1961.

In November, 1958, the District Court dismissed McElhenney's first amended complaint which alleged violations of Section 3 of the Clayton Act (167 F. Supp. 949). The Circuit Court affirmed the dismissal but remanded for the purpose of permitting the plaintiff to file another amended complaint (269 F. 2d 332). Subsequently, McElhenney's motion for leave to file such an amended pleading was denied by the District Court (unreported) and the action dismissed. On the second review, the Circuit Court reversed and remanded, holding that McElhenney's proposed amended complaint stated a cause of action. From this *per curiam* reversal, Western appeals.

Petitioner contends that the initial order of the Circuit Court in which the District Court dismissal was affirmed was an "unconditional" final order and that since that final order had never been vacated or modified that neither the District Court nor the Circuit Court had jurisdiction over the action thereafter.

Other Courts

Great Lakes Rubber Corp. v. *Herbert Cooper Co., Inc.,* (C. A. 3rd Cir., Jan. 8, 1961).

. . . A counterclaim charging unfair competition by sale of patented products without a license, through a company organized by two ex-employees, and by underbidding in amounts equal to the royalties which would be payable, was properly filed in response to a complaint charging conspiracy to restrain and monopolize commerce by bringing unjustified infringement suits and making representations to suppliers that they were guilty of contributory infringement; there was sufficient connection of subject matter to meet the test for ancillary jurisdiction of the counterclaim.

Associated Beverages Co. & Pepper v. *P. Ballentine & Sons* (C. A. 5th Cir., Jan. 7, 1961).

. . . A complaint challenging termination of a beer distributorship terminated under the terms of a letter agreement which had established it, and which made no reference to handling of competitive products, did not state a cause of action.

Central Ice Cream Co. v. *Golden Rod Ice Cream Co.* (C. A. 7th Cir., Feb. 8, 1961).

. . . In order to establish a violation of Sec. 2 of the Clayton Act, the discrimination must not only involve purchase of commodities of like grade and quality, but at least one purchase must be in interstate commerce. Where the only customer of defendant which might have been considered in interstate commérce bought a higher quality product made to special standards, therefore, there was no violation.

The Philip Carey Mfg. Co., et al. v. *Robert L. Taylor* (C. A. 6th Cir., Jan. 31, 1961).

. . . The fact that a number of individuals not subject to service in the district where suit was filed had been named as defendants did not destroy the right to have the case transferred to another district where the remaining defendants could have been sued.

DiGaetano v. *The Texas Co.* (U. S. D. C. D. N. J., Jan. 23, 1961).

. . . Even though federal courts have exclusive jurisdiction over antitrust actions, if the facts alleged in the complaint have been adjudicated in a state court proceeding between the same parties, collateral estoppel prevents their presentation. Here, the complaint was based on facts previously offered (and rejected) as a defense to a fair trade enforcement action.

Anheuser-Busch, Inc. v. *Federal Trade Commission* (C. A. 7th Cir., Jan. 25, 1961).

The Anheuser-Busch price cuts in St. Louis have been given complete clearance by the Seventh Circuit Court of Appeals, primarily on the ground that the Federal Trade Commission failed to show or find any unlawful competitive effect. Therefore, it was not necessary to rule on two other questions left open by the Supreme Court in its remand: whether a defense based on good faith meeting of competition was valid, or whether the Commission's order was too broad.

The Court of Appeals backgrounded its decision on a review of Anheuser-Busch's declining sales and profits, which led the company to make a series of efforts to stem the tide. In the St. Louis market, the company's price reductions were found to have been

temporary, part of an experimental sales promotion and made necessary by competitive conditions. Also, while the percentage figures showed a 5% increase in Anheuser-Busch's share of the market, another company's share increased about 14% and those which lost business had special difficulties unrelated to the price cuts—there was no proof of the effect of the price cuts on shares of the market, hence no proof of actual present injury to competition.

The Court then refused to consider the potential effect of the price cuts on competition, on the ground that no foundation had been laid. The Commission had pointed to the Examiner's finding that the national scope of Anheuser-Busch's operations made it possible to use the income from such operations to stabilize losses in a local price "raid"; the Court pointed to the same findings, which stated that there had been no proof of such use of income from other areas. It then concluded that the reliability of a projection of the effect of the price reductions "would depend in part upon whether weight is given to the nature of the activity"; if there is no misuse of competitive power, then "no forecast of future adverse effects on competition based on those facts [the price reductions] is valid." Mere potential misuse, as from bigness alone, is not enough to invoke the doctrine of incipiency.

Molinas v. *The National Basketball Association, et al.* (U. S. D. C. S. D. N. Y., Feb. 13, 1961).

. . . An action for treble damages by a professional athlete, alleging violation of the antitrust laws and conspiracy in suspending him and refusing reinstatement, failed to show a causal relationship between the reserve clause or alleged conspiracy and any injury he might have suffered. An anti-gambling rule was reasonable, and the refusal of the league to reinstate him reflected a reasonable exercise of its discretion.

S. Kriete Osborn v. *Sinclair Refining Co.* (C. A. 4th Cir., Feb. 28, 1961).

. . . If a seller is of sufficient size to exert "some power" and the amount of commerce restrained is "not insignificant," the standard of proof for an unlawful tying arrangement is met. If it were necessary to provide detailed industry-wide economic data, tie-in cases would be converted to "rule of reason" cases with the requirement of public injury. Thus, where a company owned more than 10%

of the gasoline stations and sold more than 10% of the gasoline in the state, and there was evidence of the effectiveness of this power to restrain commerce in the tied product, TBA, to a "not insubstantial" degree, there was a *per se* restraint.

Hohensee v. *Ferguson, et al.* (C. A. 3rd Cir., Sept. 22, 1960).

. . . Since none of the defendants being resident or transacting business in the district where suit was filed, venue was improper; also, the only service effected having been made outside the district, the court had no jurisdiction over the defendants, and properly refused to order a transfer. Allegations of conspiracy and injury to a lecturer's business through cancellation of leases and lectures, false arrests, etc., in restraint of trade did not state a cause of action.

Corning Glass Works v. *Perloff* (U. S. D. C. E. D. Pa., Feb. 21, 1961).

. . . The jurisdictional showing necessary to maintenance of suit in a federal court was not made by merely stating the amount spent nationally during 1960 in advertising fair traded products ($3,000,000). The portion allocable to the state in which the contract is to be enforced (here, Pennsylvania) must be shown, and the value of the fair trader's threatened good will in that state. This showing not having been made, a preliminary injunction against sale of the plaintiff's products at less than fair trade prices was denied.

Ideal Pictures, Inc., et al. v. *Films, Inc., et al.* (U. S. D. C. S. D. N. Y., Jan. 9, 1961).

. . . The defendant in a suit for treble damages under the antitrust laws is not entitled to defer pleading (motion, answer, etc.) to a complaint until depositions or other discovery methods have been completed. Since the complaint was sufficient for pleading purposes, a motion to defer pleading until depositions have been completed was denied.

Brown v. *Western Massachusetts Theatres, Inc.* (C. A. 1st Cir., March 10, 1961).

. . . A motion picture exhibitor failed to make a case for the jury where his strongest showing as to bidding practices involved use of alternative or superseding bidding practices by a competing exhibitor (other actors could affect the acceptance of bids by the distributors), and the parallelism alleged in award of first run films

not only occurred primarily before he acquired his theater (and upon demand he did begin to obtain first-run films), but was not uniform.

Delmar Construction Co. of Florida v. *Westinghouse Electric Corp.* (U. S. D. C. S. D. Fla., Feb. 24, 1961).

. . . Because of the close inter-relationship of subsections 2(d) and (e) of the Clayton Act, "it is both logical and reasonable" to recognize the meeting competition defense when offered in connection with payments for services or facilities furnished by the customer, under Sec. 2(d), as well as under 2(e).

Bigelow Sanford Carpet Co., Inc. v. *Federal Trade Commission, et al.* (C. A. D. C. Cir., March 23, 1961).

The Federal Trade Commission's decision to use the chemical composition of various fibers as the basic criterion for the generic names and definitions adopted under the Textile Fiber Products Identification Act has been upheld by the U. S. Court of Appeals for the District of Columbia.

The issue arose when the FTC refused to establish a new generic name for "polynosic," a cellulosic fiber for which chemical and structural differences from rayon, together with superior performance characteristics, were claimed.

The question of public acceptance or rejection of a fiber as a factor in classifying it under an existing or new generic term came into petitioner's arguments (it referred to the term rayon as "prejudicial" and "detrimental"), but was rejected, both the FTC and the Court feeling that it could advertise superior performance characteristics freely within the existing term—for instance, petitioner was free to advertise the qualities of its product as "polynosic-rayon." Its rights, therefore, were held to be fully protected.

New Orleans Opera Guild, Inc. v. *Local 174, Musicians Mutual Protective Union and American Federation of Musicians* (Louisiana Court of App. Fourth Cir., February 20, 1961).

. . . Wherever there is a labor dispute, the purpose of labor is to redress what it terms a "grievance," for which exemption is provided in the state monopoly act. Accordingly, an organization placed on an "unfair list" by the musicians union, after it refused to execute a contract calling for employment of a specified number of focal musicians for its productions, could not sue for damages under the monopoly law.

J. O. Brunk and Brown v. *General Electric Co.* (U. S. D. C. S. D. Ill., March 13, 1961).

. . . A private suit filed against GE, as an outgrowth of the recently terminated electrical equipment actions in Philadelphia, has been dismissed. Among the grounds for dismissal: the two named plaintiffs could not fairly insure adequate representation of all members of an alleged class of fifty million persons, there was no common question of law or fact, only one defendant was named, and defendant was not notified of the nature of the violation charged or the sections allegedly violated.

Channel Industries, Inc. v. *Approved Products, Inc., et al.* (U. S. D. C. E. D. Pa, Feb. 24, 1961).

. . . "Even assuming for argument" that an antitrust violation could be pleaded as a defense in a trade mark suit, the circumstances were such that a motion to amend the answer to include the defense should be denied.

The Journapak Corp. v. *Stanley G. Bair, et al.; The Journapak Corp.* v. *Goff* (U. S. D. C. D. N. Y., March 10, 1961).

. . . A consolidated complaint could not be filed (even if the court had power to order it) where claims were dissimilar; one suit, filed in a state court, was in tort for conspiracy to divert business to controlled corporations, and the other was based on violation of the antitrust laws.

Movie Color Limited v. *Eastman Kodak Co., et al.* (C. A. 2d Cir., March 10, 1961).

The Federal concealment rule operates in determining whether the statute of limitations is suspended, whether or not the suit is governed by the state limitation period, and whether or not the suit is in equity or at law. Accordingly, the limitation period in a suit under Clayton Act Sec. 4, but subject to the New York limitation period, could be extended if a case of concealment were made out. Here, this had not been done, and plaintiff was denied permission to amend its complaint.

American Football League, et al. v. *National Football League, et al.* (U. S. D. C. D. Md., March 3, 1961).

Even though a professional football team plays only one game annually in a judicial district, venue there is proper under Sec. 4 of the Clayton Act.

. . . The coach of a professional football team is a proper person to receive service of process, particularly since he is in charge of those activities in the district which make the owners (here, a partnership in one instance and a limited partnership in the other) amenable to service in the district. There was an obvious ruling, and the court made it: "The claim of 'ineligible receiver' is denied".

U. S. v. *Philadelphia National Bank* (U. S. D. C. E. D. Pa., complaint, Feb. 25, 1961).

Attorney General Robert F. Kennedy announced the filing of a civil antitrust complaint in United States District Court at Philadelphia, challenging the proposed merger of the Philadelphia National Bank and Girard Trust Corn Exchange Bank as violations of Section I of the Sherman Act and the Celler-Kefauver Act.

The Attorney General said that the "Department of Justice does not consider sized firms or expansions per se to be reason for an antitrust action. However, when growth occurs by acquisition of competition and the result is an immense concentration of power then the federal government must and will act."

The complaint asserts that Philadelphia National and Girard Trust rank second and third in Philadelphia and the surrounding area where commercial banking is heavily concentrated in a few institutions.

Philadelphia National, with 28 offices, had assets of $1,086,-147,170 on June 30, 1960. Girard Trust's assets totaled $757,572,488 on the same date.

The boards of directors of the two banks approved a plan last December 20 under which the two firms would merge under the charter of the Philadelphia National Bank with the title Philadelphia Girard National Bank and Trust Company.

The complaint points out that both Philadelphia National and Girard Trust have made numerous acquisitions which have contributed to the present degree of commercial banking concentration in the Philadelphia area.

The complaint alleged that as a result of the proposed merger: "Philadelphia National would become the largest commercial bank

in the Philadelphia area in terms of offices, assets, deposits and loans, and would be 50 percent larger than its closest competitor."

It was also alleged that the proposed merger would increase concentration to the point where the two largest commercial banks would account for 62 percent of the total assets, deposits and loans of all Philadelphia commercial banks.

The Government charged other effects of the merger, if permitted, would be:

a. Actual and potential competition between the defendants will be permanently eliminated.

b. Existing and potential competition generally in commercial banking in the Philadelphia area will be substantially and unreasonably lessened.

c. Concentration in commercial banking in the Philadelphia area will be substantially increased.

d. Existing and potential competition in the commerce and industry served by commercial banks in the Philadelphia area will be substantially and unreasonably lessened.

The Government complaint asks the court to declare the proposed merger unlawful under Section I of the Sherman Act and the Celler-Kefauver Act.

The court is also asked to enjoin Philadelphia National and Girard Trust from carrying out the merger or any similar agreement which would merge or consolidate the defendants.

U. S. v. *Armco Drainage & Metal Products, Inc.* (U. S. D. C. D. N. D. Consent Judgment, Feb. 24, 1961).

Attorney General Robert F. Kennedy announced the entry of a consent judgment in U. S. District Court at Fargo, North Dakota which enjoins Armco Drainage & Metal Products, Inc., Middletown, Ohio, from conspiring with other manufacturers or distributors of corrugated culverts to charge uniform prices, allocate sales quotas and divide customers. The judgment includes injunctions against such restrictive agreements, and against threats and intimidations. The judgment was entered in a civil antitrust suit filed by the Department of Justice June 17, 1960. The suit named Armco as defendant and listed as co-conspirators, but not defendants, six Armco

competitors in North Dakota and South Dakota. Armco was described in the complaint as the largest producer of corrugated culverts in the United States with annual sales exceeding $30,000,000. The complaint charged that Armco and the six co-conspirators had agreed to charge uniform prices, allocate sales quotas and divide customers among themselves. Among prohibitions in the judgment, Armco is enjoined from "being a member of, contributing anything of value to, or participating in the activities of any trade association or central agency of or for manufacturers of corrugated culverts with knowledge that any of the association's or agency's activities is inconstant with any provision of this final judgment." The Government charged in its complaint that effects of the conspiracy were that prices for corrugated culverts were maintained at non-competitive levels, that purchasers of corrugated culverts were denied a free choice of suppliers and that Armco Drainage & Metal products advanced its share of the market by unlawful means. A companion criminal case filed at the same time was terminated December 9, 1960. Fines totaling $51,500 were imposed on pleas of guilty in the criminal case.

U. S. v. *First National Bank & Trust Co.* (U. S. D. C. C. D. Ky., Complaint, March 1, 1961).

Attorney General Robert F. Kennedy announced the filing of a civil antitrust complaint in United States District Court at Lexington, Kentucky, asking an injunction against the proposed merger of the First National Bank and Trust Company of Lexington and the Security Trust Company. The Government charges the two firms with attempting to monopolize commercial banking in the Lexington area in violation of Sections 1 and 2 of the Sherman Act. According to the complaint, First National and Security Trust reached an agreement last December 3, under which the two banks would consolidate, bringing together the first and fourth largest banks in the area. It was charged further that consolidation would create a new firm approximately three times the size of the next largest competitor and some four to five times larger than other commercial banks in the area. The complaint asserts the merger would give the defendants control of more than 53 percent of all commercial banking assets in the area; more than 52 percent of all deposit values; 55 percent of all loan values and more than 94 per-

cent of all trust account values in Lexington. The Government also alleged that First National and Security Trust by merging would obtain a substantial competitive advantage over all other commercial banks in Lexington and that interstate trade and commerce would be unreasonably restrained. The complaint asks the court to find that the defendants have violated the Sherman Act, and to issue an order enjoining the two banks from carrying out their plan of consolidation.

U. S. v. *Bank Stock Corporation of Milwaukee* (U. S. D. C. E. D. Wis., Complaint, March 2, 1961).

The Department of Justice filed a civil action in United States District Court in Milwaukee, Wisconsin, to invalidate the recent acquisition of two banks by the Bank Stock Corporation of Milwaukee, a holding corporation. Attorney General Robert F. Kennedy said the filing of the case was in keeping with the Justice Department's responsibility "to act when such acquisition results in substantial lessening of competition." The civil antitrust complaint was the Justice Department's third challenge of a bank merger in the past five days. It asserted that the Bank Stock Corporation's acquisition of the Bank of Commerce and Northern Bank, both of Milwaukee, violated the Celler-Kefauver Act. "Commercial banking in Milwaukee is now highly concentrated in a few hands and is rapidly becoming even more concentrated through holding company acquisitions," Mr. Kennedy said. "If the trend continues the result will be a triopoly. If the acquisitions by the Bank Stock Corporation are permitted to stand, there would seem to be no reasonable basis on which to halt bank mergers in Milwaukee short of an elimination of all independent banks. This result appears to be precisely what Congress sought to avoid in enactment of the Celler-Kefauver Act." An essential purpose of the Celler-Kefauver Act, enacted in 1950, is to limit further increases in the level of economic concentration resulting from corporate mergers and acquisitions, Mr. Kennedy pointed out. Bank Stock Corporation was organized as a bank holding company, February 3, 1959, to acquire the stock of the Marshall & Ilsley Bank second largest bank in Milwaukee. On December 2, 1959, the Bank Stock Corporation acquired over 80% of the voting stock of the Marshall & Ilsley Bank and the Northern Bank. The acquisition was approved by the Board

of Governors of the Federal Reserve System, but the Justice Department at that time expressed concern over the legality of the transactions. The Justice Department did not bring suit at that time because the United States Supreme Court had under consideration United States v. Firstamerica Corporation, involving the challenges under the Celler-Kefauver Act and Section 1 of the Sherman Act. Bank Stock Corporation has subsequently filed application with the Federal Reserve Board for approval of the acquisition of 80% or more of the outstanding voting shares of a third bank, the Bank of Commerce, which the Board approved on January 25, 1961, by vote of three to two and the acquisition was consummated the following day. The complaint points out that prior to the acquisitions by the Bank Stock Corporation, Northern and Bank of Commerce competed with each other and with other banks in Milwaukee. Northern Bank was the fourth largest bank in Milwaukee. The Justice Department charged that the acquisitions have eliminated competition, increased the tendency toward monopoly and substantially increased concentration of commercial banking in Milwaukee. The complaint asked that the acquisitions be declared violations of the Celler-Kefauver Act and that the Bank Stock Corporation be required to divest itself of the stock in Northern Bank and the Bank of Commerce. The Justice Department also asked that the Bank Stock Corporation be enjoined from acquiring stock in any other commercial bank in Milwaukee without court approval.

U. S. v. *Procter & Gamble Co., et al.* (U. S. D. C. N. D. N. J., dismissal, March 6, 1961).

United States District Judge Richard Hartshorne, acting upon a motion of the Department of Justice, in Newark, New Jersey, dismissed a long-standing civil antitrust complaint against the Procter & Gamble Company, the Colgate-Palmolive Company, Lever Brothers Company, and the Association of American Soap and Glycerine Producers, Inc.

The complaint was filed on December 11, 1952, and never advanced beyond the pretrial stage. The extraordinary delay resulted partly from protracted proceedings in aid of government discovery and the death of a trial judge. Another key factor was the defendants' effort, which ultimately was successful, to require the govern-

ment to produce the transcript of a grand jury investigation which led to the filing of the complaint. The transcript issue was not finally resolved until October 1960.

The complaint alleged a conspiracy in restraint of trade and joint monopolization in the household soap and synthetic detergent industry.

Since 1952, a significant change in the industry, shifting from soap to synthetic detergents, has been accelerated greatly. Accordingly, it appears that a trial upon the legal issues involved could not result in a decree that would have any significance now, Margaret Brass, an attorney in the Antitrust Division, told Judge Hartshorne.

Attorney General Robert F. Kennedy, in announcing the Justice Department's motion, said that the case should not be protracted further and the complaint should be dismissed in the public interest and in fairness to the defendants.

U. S. v. *Idaho State Pharmaceutical Ass'n* (U. S. D. C. D. Idaho, Complaint, March 6, 1961).

The Department of Justice filed a civil complaint in Boise, Idaho, charging the Idaho State Pharmaceutical Association with conspiracy to fix prices for prescription drugs.

Attorney General Robert F. Kennedy, in announcing the filing of the complaint, said acts alleged in the complaint were violations of section 1 of the Sherman Antitrust Act. The complaint asked that the Idaho State Pharmaceutical Association be enjoined from the asserted price-fixing practices.

The complaint asserted that purchasers of prescription drugs in Idaho have been charged arbitrary and non-competitive prices since 1957 because of the asserted conspiracy. The Idaho State Pharmaceutical Association is an Idaho corporation and about 95% of all pharmacies in Idaho, licensed to sell prescription drugs, are members.

The complaint said that sales of prescription drugs by Association members totals more than $7,000,000 a year.

U. S. v. *Ward Baking Co. of N. Y., et al.* (U. S. D. C. N. D. Fla., Indict., March 6, 1961).

A Federal Grand Jury in Jacksonville, Florida, indicted five bakeries on charges of rigged bidding in the sale of bakery goods to

United States Naval Installations in Northern Florida and Southeastern Georgia.

Three of the bakeries, the Ward Baking Company of New York, American Bakeries Company of Chicago, and Southern Bakeries Company of Atlanta, Georgia, are among the largest in the nation. The other firms indicted were the Flowers Baking Company of Thomasville, Georgia and the Derst Baking Company of Savannah, Georgia.

The Grand Jury also indicted American, Flowers, Southern and Ward, and two other firms—Fuchs Baking Company of Homestead, Florida and Holsum Bakers, Inc. of Tampa, Florida on charges of conspiracy to fix prices in the wholesale distribution of bakery goods to supermarkets, restaurants and grocery stores in Florida and Southeastern Georgia.

Attorney General Robert F. Kennedy, in announcing the return of the indictments, said the bakeries are charged with violations of section 1 of the Sherman Antitrust Act.

The first indictment, charging bid-rigging in sales to the Naval installations, asserted that the Navy had been forced to pay artificially fixed prices for bakery products in the Jacksonville area since at least September 1957. According to the indictment, the defendants baked approximately 90% of the bakery products sold in the Jacksonville area, amounting to about $11,000,000 in 1959.

In the second indictment, charging a conspiracy in the wholesale distribution of bakery products, it was asserted that the defendants baked approximately 75% of bakery goods in Florida and Southeastern Georgia with sales amounting to about $23,000,000 in 1959.

The Grand Jury charged that the wholesale conspiracy began in April 1960, eliminating price competition in the sale of bakery products.

Ward, American and Southern operated bakeries in Jacksonville and other states.

U. S. v. *Milk Distributors Ass'n Inc., et al.* (U. S. D. C. D. Md., Indict., March 22, 1961).

A federal grand jury in Maryland indicted eight milk companies and four of their top executives and their association on charges of fixing prices and rigging bids in selling milk to Baltimore city and county schools.

Attorney General Robert F. Kennedy said the indictment charges that seven of the firms conspired to hike prices and allocate business from "sometime prior to 1946" until autumn 1957. A second count charges that all nine firms engaged in a similar conspiracy in 1959.

This case was the fourth involving price-fixing brought this month by the Antitrust Division of the Justice Department. Pharmaceutical associations in Idaho and Utah and five bakeries in Northern Florida and Southeastern Georgia were targets of the earlier actions.

Defendants in both counts of the indictment, filed, are:

Milk Distributors Association, Inc., Cloverland Farms Dairy, Inc.; H. E. Koontz Creamery, Inc.; Green Spring Dairy, Inc.; Will's Dairy, Inc.; and the Aristocrat Dairy, all of Baltimore and the National Dairy Products Corp. of New York, New York.

Royal Farms Dairy, Inc. of Baltimore and Penn Dairies, Inc. of Lancaster, Pennsylvania, are added in the second count, as are the following four executives, all of Baltimore.

John M. Lescure, general manager of Sealtest Western Maryland, a division of National Dairy Products.

George C. Oursler, president of the Koontz Creamery;

Maurice M. Thomas, vice-president of the Koontz firm;

James J. Ward, Jr., executive vice-president of the Green Springs firm.

Kress Farms Dairy, Inc., acquired by the Koontz Creamery April 1, 1960, and Wilton Farms, Inc., both of Baltimore, are listed as co-conspirators but not defendants.

The indictment charges that the firms "engaged in a combination and conspiracy to suppress and eliminate competition in the sale of milk to the City and County of Baltimore" in violation of section 1 of the Sherman Act.

As a result, the indictment said, "prices paid by the City of Baltimore and Baltimore County for the furnishing of milk to public schools were artificially fixed at non-competitive levels" and the city and county "have been deprived of the opportunity to purchase milk for use in their public schools for competitive prices."

The firms did more than $40,000,000 business in milk and dairy products in the greater Baltimore area in 1959, handling more than a half-billion pounds of milk, Mr. Kennedy said. As much as 20

percent of that total came from farms in Pennsylvania, Virginia and West Virginia.

The first count of the indictment asserted that bids for milk contracts with Baltimore city schools were rigged for at least 11 years.

"In recent years, the dollar volume of contracts let by the City of Baltimore to supply milk for use in its public schools has been in excess of $500,000 annually," the indictment said.

The rigging assertedly was accomplished at various meeting places at which the firms' representatives decided who would submit the winning bid for each of the eight school milk districts.

"Each year," the indictment asserted, "representatives of the (defendants) established a 'break price' . . . below which the distributor to whom a district had been allocated was to bid and above which any bids submitted by other distributors . . . were to be made."

Count two charged that bidding for city and county school milk contracts was rigged in 1959. The county schools, which adopted the city bid system in 1958-59, let contracts for approximately $650,000 a year.

The county schools awarded contracts on August 12, 1959, but then found that milk prices to nearby schools were lower.

New bids were invited, the indictment said, and "the defendant distributors and co-conspirators held further meetings for the purpose of fixing the price at which new bids were to be submitted and agreeing upon allocations.

"At these meetings the allocation of areas . . . previously agreed upon was reaffirmed and bids were submitted in accordance with these allocations."

The maximum penalty for a violation of section 1 of the Sherman Act is a year in prison and a $50,000 fine.

Department of Justice Activity

U. S. v. *Chrysler Corporation* (U. S. D. C. N. D. Ind., Complaint, April 7, 1961).

Chrysler Corporation, third-largest American automobile manufacturer, was accused by the Department of Justice of applying illegal pressure against Chrysler dealers, who also sell cars made by the

Studebaker-Packard Corporation, the nation's smallest car manufacturer.

Attorney General Robert F. Kennedy announced the filing of a civil antitrust action in United States District Court in Fort Wayne, Indiana, against Chrysler and its subsidiary, Chrysler Motors Corporation.

Chrysler Motors distributes and sells the vehicles of the parent firm.

The complaint charged that Chrysler unlawfully has required retail dealers to give up franchises for other cars—particularly Studebaker-Packard—in violation of section 1 of the Sherman Antitrust Act and section 3 of the Clayton Act, Mr. Kennedy said.

Chrysler, with 1,147,001 units sold in 1960, is approximately ten times the size of Studebaker-Packard, which sold 105,958 vehicles last year.

Of approximately 2,258 Studebaker-Packard dealers, nearly a third also sell cars of other makes, including Chrysler products.

The principal makes involved in the complaint are Studebaker-Packard's Lark, a compact car, and Chrysler's Valiant compact, put into production in the fall of 1959.

A number of Chrysler product dealers sold the Lark before Chrysler went into the compact car field.

After the Valiant became available, Chrysler representatives "on numerous occasions" told dealers that they could not sell the Valiant unless they stopped selling Larks, Mr. Kennedy said.

The complaint asserted that "a substantial number" of dealers entered into agreements or understandings to cease selling Larks and that such agreements or understandings are unlawful, Mr. Kennedy said.

The asserted agreements or understandings began at least a year ago, the complaint charged.

These agreements, the complaint charged, "have the effect of lessening competition" and "causing substantial injury to Studebaker-Packard Corporation by depriving that company of a substantial number of dealer outlets."

The complaint asked the court for temporary and permanent injunctions.

U. S. v. *Koppers Co., Inc.* (U. S. D. C. W. D. Pa., Complaint, Feb. 17, 1961).

Attorney General Robert F. Kennedy announced that a civil suit to require the Koppers Company, Inc., with headquarters at Pittsburgh, Pa., to divest itself of the Thomas Flexible Coupling Company, of Warren, Pa., was filed in the United States District Court for the Western District of Pennsylvania.

The Government's suit charged that acquisition of the Thomas Company by Koppers on January 3, 1961 was a violation of Section 7 of the Clayton Act, an antitrust statute. That section provides that no corporation engaged in commerce shall acquire, directly or indirectly, the stock or assets of another corporation if the effect would be to substantially lessen competition or tend to create a monopoly.

Acquisition of Thomas by Koppers, the suit alleged, may lessen competition and tend to create a monopoly in the manufacture and sale of flexible couplings, a metal device for transmitting power between industrial machines, in these ways: competition between Koppers and Thomas has been eliminated; Thomas has been eliminated as a substantial factor in competition; and Koppers' competitive advantage over other flexible coupling manufacturers may be enhanced to the detriment of actual and potential competition.

Koppers, which manufactures and sells a variety of products, had sales in 1959 of $240,281,000. It is the country's largest producer of flexible couplings. Thomas, although small in relation to Koppers, is the largest exclusive manufacturer of metal flexible couplings in the United States.

The Government's suit asked the court to adjudge the acquisition to be in violation of the Clayton Act and to require Koppers to divest itself of all stock interest in Thomas.

U. S. and T. V. A. v. *General Electric Co., et al.* (U. S. D. C. E. D. Pa., Civil Complaint, March 14, 1961).

The Department of Justice and the Tennessee Valley Authority, in a joint action, filed a civil complaint in Philadelphia seeking to recover more than $12,000,000 in damages from five manufacturers of heavy electrical equipment who were involved in the recent electrical price-fixing cases.

The corporations are the General Electric Company, Allis-Chalmers Manufacturing Company, the Federal Pacific Electric Company, I-T-E Circuit Breaker Company and Westinghouse Electric Corporation.

Attorney General Robert F. Kennedy said that the complaint, filed in United States District Court, was the first of several contemplated by the Department of Justice and the TVA seeking to recover damages from the 29 corporations involved in the conspiracy to fix prices and allocate business in the sale of heavy electrical equipment.

The complaint filed relates only to purchases of large outdoor oil and air circuit breakers from 1951 to 1960.

Last December 8, General Electric and Westinghouse pleaded guilty to charges of fixing prices and rigging bids. I-T-E and Federal Pacific entered pleas of nolo contendere. Allis-Chalmers had pleaded guilty to the same charges on April 8, 1960.

Federal agencies and TVA purchased more than $25,000,000 worth of circuit breakers from the firms during the nine-year period, Mr. Kennedy said. The TVA was the largest purchaser. Federal agencies which made large purchases include the Bureau of Reclamation, the Bonneville Power Administration, the Corps of Engineers, the Atomic Energy Commission and the Southwestern Power Administration.

The damages set forth in the complaint have been computed under Sections 4 and 4A of the Clayton Act and under the False Claims Act. Section 4 of the Clayton Act, providing for treble damages to any person or corporation injured by violations of the antitrust laws, assertedly applies to all purchases by the TVA. The complaint contends that the TVA is a separate corporation and, therefore, may sue for treble damages. The other purchases by the federal agencies fall under either the False Claims Act or Section 4A of the Clayton Act, the complaint said.

The False Claims Act provides for double damages, plus a $2,000 forfeiture for each false claim presented to the Government. Section 4A of the Clayton Act, which became effective in January 1956, authorizes the United States to sue for single damages for any injury sustained as a result of a violation of the antitrust laws.

The five-count complaint provides for a series of alternatives under which damages could be assessed. In Counts I and II, the complaint asked for a total of $11,900,063, plus forfeitures and additional damages which have not yet been determined. The alternative counts provide for recovery in lesser amounts.

In Count I, the TVA asks $7,478,691 as treble damages, under Section 4 of the Clayton Act, for purchases from January 1956 to

February 1960. It also seeks an undetermined amount of damages based on purchases from the defendants from 1951 to 1956.

In Count II, the Department of Justice seeks under the False Claims Act $4,421,372 as double damages, plus forfeitures on purchases by the other federal agencies from January 1956 to February 1960.

Count III is an alternative to Count II. In it, the Department of Justice sued under Section 4A of the Clayton Act for $2,210,686 as actual damages sustained by the agencies (excluding the TVA) from January 1956 to February 1960.

Count IV is an alternative to Count I in which the United States on behalf of TVA, under the False Claims Act, seeks $4,985,794 as double damages, plus forfeitures, on purchases from January 1956 to February 1960.

Count V is a second alternative to Count I in which the United States on behalf of TVA, under Section 4A of the Clayton Act, seeks $2,492,897 as the actual damages sustained on purchases from January 1956 to February 1960.

The complaint also seeks additional damages, not yet determined, based on purchase data which has not been evaluated, Mr. Kennedy said.

The complaint claims that the damages sustained are equal to the amount by which the price paid for the circuit breakers exceeded the prices which would have prevailed under competitive conditions.

The complaint sets forth the theory of damages under which the Department of Justice and the TVA have sued. The basis of the theory is that the best evidence of competitive prices in this case is the actual bid prices received from the defendants during a three and a half month period in 1958 when their price-fixing activities assertedly were the least effective.

An analysis of Government procurement and purchase data disclosed sharp price declines during the three and a half month period from August through mid-November of 1958—the period in which the Government contends the conspiracy was least effective, Mr. Kennedy said.

In the complaint, the Justice Department and the TVA outlined steps which the five firms assertedly took to fix prices and divide the sales of circuit breakers among themselves on a percentage basis. The highlights are:

1. Since at least 1951 and continuing until sometime in 1957, the representatives of General Electric, Allis-Chalmers, Federal Pacific and Westinghouse, held frequent meetings—including at least nine in 1956—for the purpose of allocating sales in response to invitations to submit sealed bids to the TVA and the federal agencies.

2. As a result, the four agreed to divide the business as follows: General Electric, 45%; Westinghouse, 35%; Allis-Chalmers, 10% and Federal Pacific, 10%.

3. I-T-E joined the meetings early in 1958 and at least seven meetings were held in various cities throughout the country to discuss price increases. In November 1958 at Atlantic City, New Jersey, representatives of the firms agreed to allocate the business on a new basis as follows: General Electric, 40.3%; Westinghouse, 31.3%; Federal Pacific, 15.6%; Allis-Chalmers, 8.8% and I-T-E, 4.0%.

4. Meetings were held a few days later for the purpose of establishing a systematic procedure for carrying out the agreement. Thereafter, between December 1958 and September 1959, at least nine such meetings were held in various cities including, Philadelphia, New York, Chicago, Seattle and Denver.

5. At these meetings a cumulative list of the sealed bid business, secured by the firms, was circulated; the relative standing of each company figured and the division of future business discussed.

6. The usual practice was for the designated manufacturer to bid the "list" or "book" price for the circuit breaker unit involved while the others submitted higher bids. On relatively small cost sales however, the firms agreed to submit identical bids and adjust bidding periodically to maintain the percentage allocation which had been agreed upon.

Representatives of the firms, to avoid detection, used code numbers in telephone calls and in correspondence, the complaint asserted.

An appendix to the complaint detailed 155 purchases of circuit breakers from the five companies from January 25, 1956 to January 6, 1960. They totaled $14,157,931 and ranged from $5,610 to $1,345,500.

The home offices of the companies are: General Electric, New York City; Allis-Chalmers, West Allis, Wisc.; Federal Pacific, Newark, N. J.; I-T-E, Philadelphia and Westinghouse, Pittsburgh.

Federal Trade Commission Activity

F. T. C. v. *Union Carbide Corp.* (FTC Dkt. #6826, Init. Dec., Feb. 27, 1961).

In an initial decision announced a Federal Trade Commission hearing examiner ruled that Union Carbide Corp., New York City, violated the antimerger law, Section 7 of the Clayton Act, by acquiring a major customer, Visking Corp., 6733 W. 65th St., Chicago, Ill.

Union Carbide, Examiner Abner E. Lipscomb said, is the country's largest manufacturer of polyethylene resins used for making polyethylene film and for various other purposes. Polyethylene film is a stiff, strong, transparent and waterproof plastic with many uses, a principal one being as a packaging material for foods, paper products and many other items.

Visking was the largest manufacturer of this film and purchased a large amount of its resin requirements from Union Carbide. In addition, Visking was the No. 1 producer of synthetic sausage casings in the United States. It was acquired by Union Carbide on December 31, 1956 in exchange for 864,449 shares of the latter's common stock, valued at almost $91 million about six weeks earlier.

The examiner held that the acquisition was illegal because it may substantially lessen competition or tend to create a monopoly in the manufacture and sale of (1) polyethylene film-grade resins and (2) polyethylene film used for flexible packaging.

He issued an order which requires Union Carbide to divest itself of all assets acquired and since added, together with the new polyethylene film plant built recently at Cartersville, Ga., as may be necessary to restore Visking to its former competitive position as an independent manufacturer of such film, but permits Union Carbide to retain all assets pertaining to synthetic sausage casings, since his order provides for dismissal of the charge in the FTC's complaint of July 8, 1957 that the acquisition endangers competition in the synthetic sausage casing market.

Through the acquisition, the examiner pointed out, Union Carbide "acquired the power to remove from the market and allocate to itself exclusively the purchasing power of the largest single customer in the market for film-grade polyethylene resins. In 1956, Visking reportedly purchased about 51½ million pounds of resins, which was about 39.7% of all the resins shipped by resin manufacturers to film ex-

truders in that year. In 1958, Visking purchased over 75 million pounds, or an increase of about 23 million pounds over its 1956 purchases. The amount of this increase was greater than the 1958 total resin shipments made by each of six of the resin manufacturers to film extruders, excepting Union Carbide and U. S. I. In 1959 Visking purchased nearly 84 million pounds of resin, an amount almost equal to the combined shipments of 84.8 million pounds to film extruders by duPont, Spencer, Dow, Monsanto and Koppers."

Tabulations in the initial decision show that total domestic shipments of high-pressure process polyethlylene resins increased from 392,897 pounds in 1956 to 727,999,000 pounds in 1959. During the same period shipments of film-grade resin rose from 129,678,000 pounds to 312,795,000 pounds.

This increase, Examiner Lipscomb commented:

> "has been accomplished by large, well-established chemical companies, and not by new entrants into the field. In fact, the probability of such new entrants obtaining a foothold in this field is slight * * *
>
> "* * * Respondent's share of the market in 1956 was slightly under 60%, almost three times that of its nearest competitor. In 1959, Respondent's share of the market, although it had declined to slightly under 50%, was still very great. Thus, Respondent was at the time of the acquisition, and still is, the major factor in the polyethylene resin market, and particularly in the polyethylene film-grade resin market. We have seen further that quantitatively the Respondent, the largest producer of polyethylene resins, has acquired the largest purchaser of such resins, and has the power to exclude the seven other producers of polyethylene resins from the substantial segment of the buying market represented by Visking. The suppressive effect of such exclusion upon competition is obvious.
>
> "* * * We have seen that entry into the polyethylene-resin market by any but a giant corporation is financially and technically almost impossible. The acquisition of technique, equipment, and personnel in this field is costly in both time and money."

The evidence establishes there is a reasonable probability that the Visking acquisition may result in a substantial lessening of competition

or tendency to create a monopoly in the manufacture and sale of polyethylene film-grade resins, the examiner found.

He added that the acquisition has these adverse effects "regardless of whether the relevant line of commerce be considered to be polyethylene film-grade resin only, or polyethylene resin for any and all uses."

Turning to the polyethylene film market, the examiner noted that in 1956 there were about 60 manufacturers and their total shipments were about 113,544,000 pounds. Visking accounted for 40.23% of these shipments and the second ranking company had a mere 6.5%. Forty of the sixty manufacturers collectively accounted for about 7.4% of the total. Visking has continued to grow, purchasing 56 film-extruding machines from January, 1956 to June 1960. These new machines have an aggregate yearly capacity of almost 108,000,000 pounds, which is more film than was shipped by all the rest of the industry in 1956.

Union Carbide, said the examiner:

> "estimates that Visking's share of the total sales of polyethylene film for flexible-packaging purposes was 24.38% in 1958, and 19.22% in 1959. If these estimates be correct, Visking's share of the market was obviously decreased percentagewise since the year of the acquisition. It must be observed, however, that such a relatively small decrease in total market share has not changed Union Carbide-Visking's position as the leader in the industry, nor substantially lessened the mutual competitive advantages gained by that acquisition."

In 1960, he continued:

> "Visking began converting a part of its film into garment bags. Respondent contends that this in no sense makes Visking a significant converter of film into finished products. However that may be, the fact that Visking is now a converter of at least a part of its own film is certainly significant. As a completely-integrated company transforming ethylene gas to resins, resin to film, and film to finished products, Union Carbide, by its acquisition of Visking, has acquired the power to shield itself from the economic pressure of competition in the film-grade resin market, with the inevitable result that Union Carbide has gained

thereby a distinct advantage over its smaller competitors in the sale of its polyethylene film products."

It appears from the evidence, the examiner found, that:

"Visking's prices set the standard for the industry, and, except in a few special instances, the smaller polyethylene film manufacturers are compelled to accept that standard and to adapt their own prices to the fluctuating ceiling so established by Visking."

Continuing, he said it also appears that the acquisition:

"has increased Union Carbide's economic power over both film-grade resins and polyethylene film—to the extent that, if exercised, that power can substantially affect competition in both lines of commerce."

F. T. C. v. *Kimbriel & Co., Inc.* (FTC Dkt. #8317, Complaint, March 30, 1961).

Kimbriel & Co., Inc., Pharr, Texas, a citrus fruit packer, has been charged by the Federal Trade Commission with making illegal brokerage payments to some customers.

Kimbriel sells through company salesmen, brokers and wholesalers, as well as direct. Brokers usually are paid a commission of 5¢ per carton or 10¢ per 1-3/5th bushel box, the FTC's complaint says.

It alleges that the concern makes substantial sales to some brokers and direct buyers purchasing for their own account for resale and on many of these sales pays brokerage or grants a discount in lieu of brokerage, which is forbidden by Section 2(c) of the amended Clayton Act.

F.T.C. v. *Thomasville Chair Co.* (FTC Dkt. #7273, Order, March 30, 1961).

Thomasville Chair Co., a furniture manufacturer at Thomasville, N. C., has been ordered by the Federal Trade Commission to stop passing on illegal brokerage to favored retail customers.

Issuing its own findings and order to cease and desist, the Commission vacated an initial decision by one of its hearing examiners which would have dismissed the complaint of October 7, 1958, for failure of proof.

In an opinion by Commissioner Robert T. Secrest, the FTC said the concern sells its bedroom, dining room and upholstered furniture to retail stores throughout the country. In selling the bedroom and dining room items, which account for 87% of its total sales, the company uses two different price lists. "Jobber" or "J" accounts are charged about 5% less than retailers in the "Carload" or "CL" classification. Thomasville's salesmen are paid 3% commission on "J" sales and 6% on "CL" sales.

The Commission ruled that (1) Thomasville's payments to its salesmen constitute a "commission, brokerage or other compensation" under the broad definition in Section 2(c) of the amended Clayton Act, and (2) the 5% price reduction to "Jobber" accounts was based in part on the saving resulting from the lesser commission paid on these sales and thus is a discount or lower price in lieu of such brokerage or commission, in violation of the statute.

The company claimed the "J" classification is for dealers whose purchases amount to at least $50,000 a year, and customers purchasing less than that amount are classed as "CL" accounts. It contended that the "J" customers' larger volume of purchases results in a difference in costs of at least 5%, not including saving in sales commission, in serving the two classes of customers.

The hearing examiner had found that the company has deviated from the criterion of volume purchases in classifying customers in only a few isolated instances and has, in good faith, tried to keep the integrity of the two classifications.

Disagreeing with this finding, the Commission noted that in four trade areas only 12 out of 28 "J" customers receiving the 5% price reduction had purchased more than $50,000 worth of furniture in 1955, and only 12 out of 30 "J" customers purchased in excess of this minimum in 1956.

It ruled:

> "the record clearly demonstrates that the purchases of a large percentage of the favored customers have amounted to substantially less than $50,000 per year. Consequently, there would appear to be no valid basis for distinguishing between this group of 'J' customers and the 'CL' customers. Applying respondent's criterion of volume purchases, there would be no demonstrable savings in costs to respondent in dealing with the one as op-

posed to the other. As to these 'J' customers, at least, the price reduction cannot be accounted for by any savings in costs other than the saving in the salesmen's commissions. We think it may be inferred, therefore, that the saving in commissions on sales to such 'J' customers was not retained by respondent, but was passed on to the customer."

The FTC further held that the three cost studies introduced by Thomasville do "not support its contention that the price reduction to 'J' customers can be accounted for by savings in cost other than the saving in sales commission."

Pointing out various defects in the two studies prepared by the company itself, the Commission said they "are completely lacking in probative value."

According to the third cost study, prepared by a professional accountant, it cost the company about 4% less to serve "J" customers, excluding the difference in sales commissions.

"This study, therefore," the FTC commented, "even when viewed in the light most favorable to respondent, demonstrates that part of the 5% price reduction reflects a saving in sales commission. A more critical examination of the study reveals that many of the major expense items involved have been allocated in such a manner as to exaggerate whatever difference may exist in the costs to respondent in serving the two classes of customers."

The cost data placed in the record by Thomasville, the Commission ruled, not only fails:

"to rebut the case in support of the complaint, but it substantiates the charge that the lower price to favored customers was in fact based, in part at least, on a saving in sales commission.

"It is our conclusion, therefore, that respondent has violated subsection (c) of Section 2 of the amended Clayton Act by granting to its 'Jobber' accounts a discount or lower price based in part on the saving resulting from the different rates of commission paid its sales representatives."

F. T. C. v. *Faber Brothers, Inc.* (FTC Dkt. #8062, Consent Order, April 4, 1961).

Faber Brothers, Inc., a sporting goods distributor in Chicago, Ill., has consented to a Federal Trade Commission order prohibiting it from charging different prices to competing retail customers.

The Commission affirmed an initial decision by Hearing Examiner John Lewis accepting an order agreed to by both the company and FTC's Bureau of Litigation.

In a complaint filed last July 29, the FTC alleged that Faber classifies certain retailers as "Favorite Sport Stores" and sells to them at cost plus 10%, while competing customers are charged the usual price—cost plus 33%.

These price discriminations, the complaint contended, may substantially lessen competition or tend to create a monopoly.

The concern's agreement to discontinue the challenged pricing practices is for settlement purposes only and does not constitute an admission that it has violated the law.

F. T. C. v. *Plumrose, Inc.*. (FTC Dkt. #7753, Init. Dec., April 3, 1961).

A Federal Trade Commission hearing examiner issued an order which would dismiss for lack of jurisdiction a complaint charging that Plumrose, Inc., has discriminated among its customers in granting promotional allowances in violation of Section 2(d) of the amended Clayton Act. The company, a distributor of Danish canned meats, has its offices at 99 Hudson Street, New York City.

The order was contained in an initial decision by Examiner Abner E. Lipscomb.

Examiner Lipscomb found that Plumrose is a "packer" under the definition in the Packers and Stockyards Act of 1921 and that the concern is a wholesaler exclusively whereas the FTC's jurisdiction over packers is limited to their retail sales. (The Secretary of Agriculture has jurisdiction over packers' other activities.)

The examiner pointed out that Plumrose is a wholly-owned subsidiary of P. & S. Plum, Ltd., Copenhagen, Denmark. He added that the parent operates a packing plant and slaughterhouses in Denmark and "is clearly a packer."

According to the definition in the Packers Act, the examiner said, "Since the respondent is a wholly-owned subsidiary of a packer . . . the respondent must itself be classified as a packer."

In 1958, he continued, both this statute and the FTC Act were amended to extend FTC jurisdiction over packers, and the Commission's interpretation of the amendments in another proceeding clearly limits such jurisdiction to retail sales.

He added:

> "The evidence shows that the Respondent herein is not engaged in selling at retail, but is engaged exclusively in the business of selling and distributing meats at wholesale.
>
> "We must therefore conclude that the Federal Trade Commission does not have jurisdiction over the acts and practices of this Respondent as alleged in the complaint."

The complaint in this proceeding was issued January 25, 1960.

F. T. C. v. *Pittsburgh Plate Glass Co.* (FTC Dkt. #8328, Complaint, April 3, 1961).

The Federal Trade Commission charged Pittsburgh Plate Glass Co., One Gateway Center, Pittsburgh, Pa., with furnishing discriminatory services and facilities to some customers.

For example, the Commission alleges in a formal complaint, the company designates certain customers "A. I. D. Dealers" (an abbreviation of "autoglass installation dealer") and gives them certain benefits not accorded to all other competing purchasers on proportionally equal terms, in violation of Section 2(e) of the Robinson-Patman Amendment to the Clayton Act.

In conjunction with its A. I. D. program, the complaint says, Pittsburgh advertises its auto replacement glass on television and in trade publications and nationally published magazines. It also places the names of all "A. I. D. dealers" in the classified section of the telephone directory. All of these advertisements are paid for by Pittsburgh and direct the attention of prospective customers to the "A. I. D. dealer" handling its products.

The complaint contends that there are many competing dealer customers who are not given this designation and thus are not accorded these services and facilities.

F. T. C. v. *Kaiser Industries, Inc.* (FTC Dkt. #8341, Complaint, March 29, 1961).

The Federal Trade Commission issued charges that Kaiser Industries Corp. and three of its subsidiaries and affiliates, all of Oakland, Calif., have violated the antimerger law, Section 7 of the Clayton Act.

The other three Kaiser companies cited in the FTC's complaint are Henry J. Kaiser Co., Kaiser Aluminum & Chemical Corp., and Kaiser Steel Corp.

The complaint challenges Kaiser Steel's purchase of 45% of the voting stock of Allison Steel Manufacturing Co., Phoenix Ariz., on May 15, 1958 for more than $1.1 million, following which at least two executives of the Kaiser interests were elected to Allison's Board of Directors.

The acquisition, the complaint contends, may substantially lessen competition or tend to create a monopoly in the following lines of commerce in Maricopa County, Arizona, the entire state, or in other sections of the country:

The sale of primary steel and aluminum;

The fabrication and erection of structural steel and structural aluminum;

The manufacture of other steel and aluminum products.

[At the same time the FTC dismissed an earlier complaint challenging this acquisition—D. 8027, which cited only Kaiser Steel. The "public interest will be better served by instituting a new proceeding under a different form of complaint," the Commission said.]

According to complaint, Kaiser Co. owns 80% of the voting securities of Kaiser Steel and 37% of the voting securities of Kaiser Aluminum. The business practices of all three concerns are directed and controlled by Kaiser Industries. Kaiser Aluminum is the 3rd largest producer of primary aluminum in the United States. Its 1959 capacity of 609,000 tons represented an increase of 325% since 1950 and was more than 30% of the total national capacity. Kaiser Steel is the 2nd largest steel producer in the western states and the 9th largest in the entire country.

Allison, the complaint says, was the largest independent fabricator and erector of structural steel in Arizona and accounted for about 40% of that business in the state. In Maricopa County (which includes the City of Phoenix) it has accounted for as much as 50%

of such business. It also was one of the largest independent fabricators of structural aluminum and other aluminum products in Arizona and in Maricopa County. Allison also has performed contracts for fabricating and erecting steel and aluminum in New Mexico, Colorado, Nevada, California and other states. Its basic raw materials are purchased primarily from Kaiser Steel, Kaiser Aluminum and other western producers. In addition, Allison is a jobber and warehouser for certain types of manufactured metal products, and does miscellaneous other work.

The complaint says that independent non-integrated fabricators such as Allison are of great importance to the nation's economy and in recent years a considerable number of them have been acquired by integrated producers of primary steel and aluminum. This has led to a serious trend toward concentration in a few large companies tending to lessen competition and develop monopolistic industry conditions, the complaint alleges.

It charges that respondents' acquisition of a substantial portion of Allison's voting stock may have the following adverse effects, among others:

> Actual and potential competition has been or may be substantially lessened in (1) the supply of primary steel and aluminum to Allison, and (2) the fabrication and erection of structural steel and structural aluminum and in the manufacture of other steel and aluminum products.
>
> Actual and potential competition between respondents and Allison in fabricating and erecting structural steel and aluminum and in manufacturing other steel and aluminum products has been or may be eliminated.
>
> Respondents' competitive advantage over others in these fields has been or may be enhanced to the detriment of actual and potential competition.
>
> Mergers and acquisitions by others have been or may be fostered, with a consequent increase in concentration and tendency toward monopoly, to the detriment of actual and potential competition.
>
> Respondents' competitive advantage as integrated producers, manufacturers, fabricators and erectors, and as suppliers to

non-integrated fabricators and erectors has been or may be enhanced.

Allison hase been eliminated as (1) the largest independent fabricator and erector of structural steel in Arizona and (2) one of the largest independent fabricators and erectors of structural aluminum in that state.

F. T. C. v. *Nibco, Inc.* (FTC Dkt. #8074, Consent Order, March 22, 1961).

The Federal Trade Commission has approved a consent order forbidding Nibco, Inc., Elkhart, Ind., a manufacturer of valves, fittings and related products used by plumbers and steamfitters, to discriminate among its customers in paying promotional allowances.

However, the order dismisses allegations in the FTC's complaint of last August 10 that Nibco has unlawfully fixed and maintained resale prices of its products.

The order was based on an agreement between the company and FTC's Bureau of Litigation. It was accepted by Hearing Examiner Earl J. Kolb in an initial decision, which the Commission adopted.

Nibco was charged in the complaint with paying promotional allowances to some cusomers but not making them available on proportionally equal terms to all competing customers, as required by Section 2(d) of the Robinson-Patnam Amendment to the Clayton Act.

For example, the complaint said, between September 1958 and June 1959 the company made discriminatory payments amounting to $2500 to the American Radiator and Standard Sanitary Corp. for promoting Nibco's products through television programs sponsored by American-Standard in several trading areas.

The examiner pointed out that the price-fixing charge in the complaint:

> "was based upon the belief that respondent's system of distribution utilized distributors who were independent businessmen, when in fact said distributors were manufacturers' sales representatives, and as such were agents of the respondent. Consequently, it was agreed that * * * [this charge] should be dismissed."

Nibco's agreement to pay allowances on a proportionally equal basis only henceforth is for settlement purposes only and does not constitute an admission that it has violated the law.

F. T. C. v. *Simmons Co.* (FTC Dkt. #8116, Consent Order, March 22, 1961).

The Federal Trade Commission has issued a consent order forbidding Simmons Co., New York City, to pay discriminatory allowances to favored purchasers of its mattresses, box springs, upholstered sofas and other furniture.

The order was agreed to by both Simmons and FTC's Bureau of Litigation. It was accepted in an initial decision by Hearing Examiner Leon R. Gross, which the Commission affirmed.

In a complaint filed last September 16, the FTC charged that the terms of the Simmons Cooperative Advertising Plan are tailored to exclude all but larger customers.

The complaint cited this example of the plan: During 1959 Simmons paid to John Wanamaker and to Lit Bros., both of Philadelphia, Pa., more than $2,400 and $4,000, respectively, for advertising or other services. These allowances were not made available on proportionally equal terms to all other competing customers as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act, the complaint alleged.

It added that Simmons similarly has favored other large retailers in Philadelphia and in other cities over their competitors.

The order provides that future payments must be made on a proportionally equal basis only.

F. T. C. v. *Swift & Co.* (FTC Dkt. #8304, Complaint, March 22, 1961).

Swift & Co., Chicago, Ill., a multi-million dollar corporation, has illegally restrained competition by offering costly, unfair inducements to get retailers to handle its ice cream and other frozen products, the Federal Trade Commission charged today in a formal complaint.

The challenged inducements furnished dealers include loans, ice cream cabinets, servicing of equipment, gifts, discriminatory prices and sales below cost.

The complaint alleges that small businesses in the industry must try to meet Swift's offers but, due to lack of capital, many have had

to sell out to Swift and other larger corporations while others have been compelled to discontinue operations.

At its own expense, Swift supplies dealers with cabinets or refrigeration units ("facilities") costing from $500 to $5000, the complaint says. Since most retailers have limited space for these, the company monopolizes markets by placing its equipment in dealers' places of business. Such placement by a manufacturer is tantamount to an exclusive requirements contract with or without an agreement that only its frozen products shall be stored in or sold from the equipment, the complaint contends.

It adds that Swift finances dealers by loans of money, by financing and helping to finance purchases of facilities, by advancing sums to be earned later as discounts for quantity purchases, by transferring cash to dealers directly or under various guises, and by investing capital in their places or prospective places of business.

Also, dealers allegedly receive miscellaneous inducements such as servicing of dealer-owned equipment used for other products, moving and arrangement of store equipment, assistance in obtaining equipment at reduced prices, signs and parts of signs not normally given under standard advertising practices, and gifts of clocks, back bars and other items.

The complaint further alleges Swift charges some dealers less than others and makes some sales at less than cost prices.

According to the complaint, in 1958 Swift's sales totaled almost $2.6½ billion and its working capital was over $212 million. It operates some 40 frozen products processing plants in various states and is one of ten manufacturer-wholesalers operating on a nationwide basis. These ten account for more than half of the more than 500 million gallons of frozen products consumed annually in the United States. In addition to the ten national sellers, there is a varying number of intermediate size manufacturer-wholesalers, who operate on a "regional" basis. A third group consists of "local" or "home-town" enterprises. This latter group comprised some 3000 to 3500 companies in 1947 but declined to under 1500 by 1959. In 1947 the combined market share of the "local" and "regional" groups was between 55% and 60%. Swift and others in the "nationwide" group accounted for the remaining 40% to 45% in 1947 but increased their share from 55% to 60% by 1959. This increase

in concentration resulted in part from the impact of the challenged practices, the complaint asserts.

Alleging that Swift's inducements are unfair methods of competition prohibited under Section 5 of the FTC Act, the complaint charges they:

> Unduly and substantially suppress competition between Swift and its competitors;
>
> Contribute to monopolization of the frozen products industry in the hands of a few;
>
> Prejudice small business concerns with limited resources;
>
> Tend to destroy retailers' freedom to select frozen products pursuant to customer demands or by their own free will;
>
> Prejudice growth and development of the industry from the standpoints both of competition and of the public interest in products of high quality at fair prices;
>
> Tend to put a premium upon the availability of capital in the competitive race in the industry and to detract from the importance of the ability to compete on price, quality and service;
>
> Focus competition on cabinets and other gifts and gratuities and reduce the competitive importance of price, quality and service.

F. T. C. v. *S. C. Johnson & Sons, Inc.* (FTC Dkt. #8177, Consent Order, March 24, 1961).

S. C. Johnson & Son, Inc., Racine, Wis., a manufacturer of floor waxes, furniture polishes, automotive waxes and polishes, and other chemical specialties, has consented to an order forbidding it to discriminate among its customers in paying advertising allowances, the Federal Trade Commission announced.

The Commission adopted Hearing Examiner William L. Pack's initial decision based on an order agreed to by Johnson and FTC's Bureau of Litigation.

The company was charged in the FTC's complaint of last November 17 with paying some customers allowances which were not made available on proportionally equal terms to all competing customers, as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

For example, the complaint said, in 1959 Johnson made a discriminatory payment of $350 to Benner Tea Co., a retail grocery chain headquartered in Burlington, Iowa.

F. T. C. v. *Carnation Co., et al.* (FTC Dkt. #6172-79 and 6425, Remand Order, March 24, 1961).

The Federal Trade Commission has directed one of its hearing examiners to receive further evidence on whether the following major ice cream manufacturers have used exclusive dealing agreements to sell their frozen products:

(6172) Carnation Co., Los Angeles, Calif.
(6173) The Borden Co., New York City.
(6174) Beatrice Foods Company (Delaware), Chicago, Ill.
(6175) National Dairy Products Corp., New York City.
(6176) Pet Milk Co., St. Louis, Mo.
(6177) Fairmont Foods Co., Omaha, Nebr.
(6178) Arden Farms Co., Los Angeles.
(6179) Foremost Dairies, Inc., Jacksonville, Fla.
(6425) H. P. Hood & Sons, Inc., Boston, Mass.

In an earlier initial decision Examiner John Lewis had ordered dismissal of the FTC's 1955 complaints, which charged that the nine manufacturers and 55 of their subsidiaries have unlawfully lessened competition by using unfair competitive methods to make sales.

As grounds for the dismissal, the examiner had held that the evidence fails to establish that the manufacturers have induced or attempted to induce dealers, to any significant extent, to handle their frozen products exclusively by furnishing such items as refrigeration cabinets and other equipment, loans, servicing of equipment, and discounts, rebates and allowances.

He added that the record does not prove any trend of concentration in the industry in favor of the respondents, or any substantial injury, or reasonable probability of injury, to competition resulting from these dealer aids.

FTC counsel appealed from the initial decision and oral argument was heard before the Commission the latter part of 1960.

In today's order, the Commission said an informed disposition of the appeal requires an appraisal of all aspects of the competitive effects

of the challenged practices. This involves, among other things, a consideration of the approximate amount of trade which has been or may be restrained or otherwise affected by these activities, it pointed out.

Noting that "the records as presently constituted do not contain accurate and reliable statistics from which this information may be ascertained," the Commission remanded the proceeding to the examiner.

He was instructed to receive:

> "such further evidence as may be offered for the purpose of showing, for some reasonable period of time, the extent to which requirements contracts, 'trade agreements' or other exclusive dealing agreements have been used by the various respondents, their subsidiaries and affiliates in connection with, or ancillary to, the sale of ice cream and other frozen products, the identity and location of the customers with whom such arrangements have been negotiated, and the quantities and dollar volumes of the products which have been involved in the transactions."

The FTC directed the examiner to then indicate any changes he may wish to make in his initial decision.

Commissioner Kern did not participate in this action.

F. T. C. v. *H. P. Hood & Sons, Inc.* (FTC Dkt. #7709, Remand Order, March 23, 1961).

The Federal Trade Commission gave its views as to what documents and records may properly be withheld from the public record and placed in evidence in secret ("in camera").

The views were expressed in a Commission opinion in Docket 7709, H. P. Hood & Sons, Inc., ruling on an interlocutory appeal by FTC counsel from orders of the hearing examiner placing certain documents "in camera."

The opinion by Commissioner Sigurd Anderson stated:

> "The Commission's Rules of Practice do not specifically provide for the *'in camera'* procedure involved here. However, the selective withholding of exhibits from the public record has been the practice in our adjudicative hearings for many years.

When properly employed, the practice has merit and we have not up to this time promulgated any definitive directions or restrictions with respect to it. The matter has been left where it belongs, to the sound discretion of the hearing examiner, and until now we are not aware that this discretion has been abused."

The Commission pointed out that the Administrative Procedure Act (5 U. S. C. 1002 (c)) sanctions keeping secret certain "matters of official record . . . for good cause found." However, the opinion added, the examiner in this matter erred in placing upon FTC counsel the burden of showing why the documents should be placed in the public record.

"As grounds for placing the documents *'in camera,'* he relied upon the unsupported statement of respondent's counsel that their public disclosure might result in injury to respondent. Quite clearly, the burden of showing 'good cause' rests with the party requesting that the documents be placed *'in camera.'* Neither party need show cause why evidence should be placed in the public record since such placement is mandatory unless excused.

"We come now to the heart of the problem. What minimum showing constitutes 'good cause' and will justify withholding documents from the public record? . . .

"It is our belief that the correct rule requires a showing that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved . . .

"While all authorities agree that there is no absolute privilege against disclosure of business secrets, the courts have generally attempted to protect confidential business information from unnecessary airing. Cases dealing with this subject quite frequently make use of the term 'trade secrets,' but there appears to be some confusion as to the scope of the term, with some courts defining it to include only those facts dealing with secret formulas, research or processes, while others seem to hold the term embraces all confidential business records. It seems to us that there is such a wide difference between a secret formula or process and ordinary business records that a single term cannot encompass the whole field. Obviously the disclosure of a secret formula will almost invariably result in injury while the revelation of a business

record may in many instances produce no more than embarrassment. In the parlance of the military, the former would be labeled 'top secret' while the latter would rate only the classification of 'confidential' or 'restricted.' Thus it seems obvious that a different degree of protection should be afforded these two classes of information.

"Since the impact of disclosure of a 'trade secret,' as distinguished from other records, would almost certainly be productive of injury, motions to place documents of this nature *'in camera'* should be sympathetically considered. In most instances, injury sufficient to establish 'good cause' for sealing the documents can be inferred from the nature of the 'trade secret' itself.

"The documents involved in this proceeding are not 'trade secrets,' but consist for the most part, of ordinary business records. They do contain information of a type which most businesses would prefer to keep confidential, such as the names of customers, prices to certain customers, costs of doing business and profits. But the probability of a concrete injury resulting from the disclosure of these documents cannot be inferred from the nature of their content nor the mere fact that respondent prefers to keep them confidential. Thus, documents of this type do not merit the degree of protection afforded to 'trade secrets.' In our view, requests to seal relevant evidence of this type should be looked upon with disfavor and only granted in exceptional circumstances upon a clear showing that an irreparable injury will result from disclosure.

"While it is obviously not possible to make an *a priori* ruling as to the facts which would constitute a showing of 'good cause' under the rule, we can point to certain possible grounds which, in our opinion, would not support an *'in camera'* ruling. Quite clearly the mere embarrassment of the movant should not foreclose public disclosure. Nor should documents be sealed simply on the ground that they contain information which competitors for business reasons are extremely desirous to possess.

"Certainly the exposure of the respondent to possible treble damage actions is not the type of injury which would constitute 'good cause' for secreting this evidence. Placing documents *'in camera'* for this reason would constitute a direct attempt to frustrate and defeat the will and intent of Congress . . ."

The Commission remanded the case to the examiner "for his further consideration in accordance with the views expressed in this opinion. It added that the "documents in question shall remain *'in camera'* pending reconsideration by the hearing examiner after he has afforded respondent opportunity to show cause why they should not be made a part of the public record."

Commissioner William C. Kern did not participate in the decision.

F. T. C. v. *Mueller Co.* (FTC Dkt. #7514, Init. Dec., April 5, 1961).

A Federal Trade Commission hearing examiner has issued an order which would dismiss charges that Mueller Co., Decatur, Ill., one of the nation's largest manufacturers of products used in municipal and private gas and water works systems, has given discriminatory discounts to some of its jobbers.

The examiner, William L. Pack, said Mueller sells both direct to ultimate users and to jobbers, who resell to such users. This case stems from the concern's practice of classifying jobbers into two categories—"limit" and "regular"—and granting a 25% discount on certain items to the former but only 15% to the latter. These items consist mostly "of the smaller, most commonly used products—those which are needed most frequently by the ultimate user, often to meet an emergency."

The examiner ruled that the higher discount given limit jobbers "is a functional discount representing no more than reasonable compensation for services and facilities actually supplied by such jobbers; that in the circumstances here present there is no substantial competitive injury, nor any reasonable probability thereof, to respondent's regular jobbers; and that therefore no violation of the statute [Section 2(a) of the Robinson-Patman Amendment to the Clayton Act] has been established."

The limit jobber, Examiner Pack pointed out, maintains an adequate supply of these items and can supply them to the user immediately upon request. The regular jobber, on the other hand, keeps little or no inventory and can supply a user's needs only by special order to Mueller or to a limit jobber. The additional 10% is a functional discount in return for services performed by the limit jobber in maintaining an adequate inventory of the products in question. It is not allowed on any other items, whether carried in stock or not.

Mueller formerly maintained warehouses to stock these items but discontinued them because of the expense, continued the examiner. It then adopted the present plan of allowing an extra 10% discount to jobbers willing to perform the warehousing function. This plan apparently was not originated by the company but was already in use by others in the industry.

"The increased discount of 10% is no greater than is necessary to reimburse respondent's limit jobbers for the function they perform. The undisputed evidence is that it costs at least 10 percent, and probably more, to maintain an inventory of goods such as are here involved and supply them to users when needed," the examiner stated.

The facts in this case seem clearly to show that this additional 10% is a permissible functional discount under the criteria announced by the FTC in its leading proceeding on this subject, he held.

"It also seems clear," he said, "that there is a failure of proof as to competitive injury, either actual or potential, in view of the fact that respondent's limit jobbers receive the higher discount only on certain goods actually warehoused by them, and the further fact that the cost of such service equals or exceeds the difference in discounts. In these circumstances it is difficult to see how there can be any substantial injury to the regular jobbers."

The examiner also stressed that any dealer with a satisfactory credit rating can become a limit jobber, provided he is willing to maintain a reasonably adequate inventory of the items in question. Mueller's regular jobbers not infrequently convert to limit jobbers, and, conversely, limit jobbers sometimes prefer to discontinue the maintenance of an inventory and become regular jobbers. Less than 2% of Mueller's total sales of all products are to regular jobbers.

F. T. C. v. *C. F. Sauer Co. & Usen Canning Co.* (FTC Dkt. #8312 and 8313, Complaints, March 27, 1961).

The Federal Trade Commission has charged two manufacturers of grocery items with paying discriminatory allowances to some customers. They are:

> The C. F. Sauer Co., Richmond, Va., a manufacturer of spices, food colors, mayonnaise, cough syrup, liniment and other products. (8312)
>
> Usen Canning Co., Boston, Mass., a producer of cat food. (8313)

According to the FTC's separate complaints, each company has paid advertising allowances to some customers but failed to make them available on proportionally equal terms to all other competing customers, in violation of Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

For example, the complaints allege, in 1960 Winn-Dixie Stores, Inc., a retail grocery chain with headquarters in Jacksonville, Fla., received preferential payments of $250 from Usen and $200 from Sauer.

F. T. C. v. *Bakers of Washington, Inc.* (FTC Dkt. #8309, Complaint, March 27, 1961).

The Federal Trade Commission charged that Bakers of Washington, Inc., a trade association of bakers in Seattle, Wash., and its officers, Board of Trustees and members, together with two non-members, have utilized an unlawful price-fixing conspiracy to suppress competition in the production, distribution and sale of bread.

The following eight bakeries are named in the FTC's complaint as representative of all association members because the large membership makes it impracticable to name each:

Buchan Baking Co., Seattle.

Continental Baking Co., which has executive offices at Rye, N. Y., and a branch office and plant at Seattle.

Langendorf United Bakeries, Inc., with general offices at San Francisco, Calif., and a branch office and plant at Seattle.

Hansen Baking Co., Inc., Seattle.

Trennery's Bakery Co., Yakima, Wash.

Snyder's Bakery, Inc., Yakima.

John M. Larson, trading as Larson's Bakery, Yakima.

Vic H. Goethals, trading as Fortune's Bakery, Anacortes, Wash.

Three officers of the association, George B. Buchan, Richard Hoyt and Arthur H. Lalime, similarly are cited as representative of all its officials, Board of Trustees and employees.

Joined in the complaint are these two non-members who allegedly participated in the illegal conspiracy: Holsum Baking Co., Lewiston, Idaho; and Safeway Stores, Inc., which has principal offices at Oak-

land, Calif., a Bread Division at San Jose, Calif., and a bread plant at Seattle.

According to the complaint, the respondents fix and maintain identical, non-competitive prices for bread and cooperatively promote adherence to these prices. The association is used by the officials and members to eliminate price competition. Among other practices of the respondents alleged to be illegal, they discuss competitive conditions at regular meetings and agree upon and establish trade policies to be followed and prices to be charged by members for their bread. These fixed prices are then put into effect simultaneously or virtually so. Mr. Lalime, the association's secretary-manager, serves as a common agent for the members in suppressing price competition in the sale of their bread.

This conspiracy, the complaint alleges, not only has unlawfully restrained price competition among respondents but tends to increase substantially the cost of food to the public.

These activities are unfair methods of competition forbidden by Section 5 of the FTC Act, the complaint concludes.

F. T. C. v. *Vanity Paper Mills, Inc.* (FTC Dkt. #7720, Init. Dec., April 5, 1961).

Vanity Fair Paper Mills, Inc., a manufacturer of household paper products, would be required to stop discriminating among its customers in paying promotional allowances, under terms of an order announced by a Federal Trade Commission hearing examiner.

Examiner Walter R. Johnson found that the company has paid allowances to J. Weingarten, Inc., a retail grocery chain headquartered in Houston, Texas, but did not make them available on proportionally equal terms to all other competing customers. This discrimination violates Section 2(d) of the Robinson-Patman Amendment to the Clayton Act, he held.

According to the examiner, Vanity Fair accounts for about 2.5% of sales of these products in the United States, ranking approximately 10th in the industry. In 1958 its sales totaled some $15.4 million and it had a standard contract under which it reimbursed customers for maintaining good shelf displays of its products and for advertising them in newspapers at least once during each quarter of the year. Since the concern lacked sufficient funds for extensive advertising in

various media and relied on the support of customers' promotions, its policy was to consider any customer's request to participate in one-time special promotions conducted by that customer.

At Weingarten's request, the examiner said, Vanity Fair participated in two 1958 promotions by the chain. Selecting one of the least expensive deals offered, Vanity Fair paid the chain $215 each time in return for having one of its products displayed in all Weingarten outlets in Texas and Louisiana and for 1/16 of a page of newspaper advertising. During 1958 Vanity Fair sold its items to about 28 customers in various areas where Weingarten does business and many of them competed with the chain in reselling the products.

"Of these 28 customers," Examiner Johnson pointed out, "9 received reimbursement for advertising services under the standard contract . . . Only two received, or were offered, special promotional allowances. These two included Weingarten and one other retail grocery chain. A tabulation of the sales and promotional allowances to these 28 customers during 1958 and the relationship between these sales and promotional allowances, reveals further that the said allowances received by Weingarten are proportionally in excess of those received by any other customer of respondent during the period in question."

He ruled that Vanity Fair's "policy of participation in certain of its customers' special promotions, without making payments available on proportionally equal terms to all other competing customers, constitutes a plan of 'separate and individual arrangement. . . . Such individualized and preferential treatment was the very thing Section 2(d) was designed to prevent.' "

F. T. C. v. *Luria Brothers & Co., Inc.* (FTC Dkt. #6156, Init. Dec., April 13, 1961).

Hearing Examiner John Lewis of the Federal Trade Commission ruled in an initial decision announced that the exclusive-supplying arrangements between Luria Brothers & Co., Inc., Philadelphia, Pa., the nation's largest broker of iron and steel scrap, and domestic and European steel producers have illegally restrained competition in the scrap industry and are monopolistic.

In addition, he held that Luria's acquisition of two competitors in the industry violates Section 7 of the Clayton Act, the antimerger

law. The two concerns are Pueblo Compressed Steel Corp., Pueblo, Colo., and Southwest Steel Corp., Pittsburgh, Pa.

He issued an order containing provisions designed to restore competitive conditions in the industry and requiring Luria to sell Pueblo and Southwest. A key provision of the order is that for the next five years the 18 respondent American steel mills must buy at least 50% of their purchased scrap requirements from other suppliers who submit offers comparable to Luria's, unless this cannot be done because of insufficient quantities offered or delivered by such suppliers. The order also prohibits, without time limitation, exclusive brokerage or supply agreements between Luria and the steel mills.

The initial decision follows 113 days of hearings held in cities throughout the country on the FTC's complaint of January 19, 1954, as amended and supplemented on July 13, 1954 and further amended on April 16, 1956. More than 250 witnesses testified and the record includes about 14,000 pages of testimony, depositions of 130 pages, and over 1,300 documentary exhibits aggregating many thousands of pages.

The examiner found that Luria has separate agreements with the following respondent domestic steel producers, as well as with other mills, whereby each buys from Luria all or substantially all of their iron and steel scrap or all of such scrap purchased from brokers:

Bethlehem Steel Corp., New York City, and two subsidiaries, *Bethlehem Steel Co.,* Bethlehem, Pa., and *Bethlehem Pacific Coast Steel Corp.,* San Francisco, Calif.

United States Steel Corp., New York City.

National Steel Corp., Pittsburgh, Pa., and a subsidiary, *Weirton Steel Co.,* Weirton, W. Va.

The Colorado Fuel & Iron Corp., Denver, Colo., and a subsidiary, *John A. Roebling's Sons Corp.,* Trenton, N. J.

Central Iron & Steel Co., formerly of Harrisburg, Pa. (now known as Phoenix Iron & Steel Co.).

Phoenix Iron & Steel Co., Phoenixville, Pa.

Granite City Steel Co., Granite City, Ill.

Lukens Steel Co., Coatesville, Pa.

Detroit Steel Corp., Detroit, Mich.

McClouth Steel Corp., Detroit.

Baldwin-Lima-Hamilton Corp., Eddystone, Pa.

Edgewater Steel Co., Oakmont, Pa.

Bucyrus-Erie Co., South Milwaukee, Wisc.

Columbia Malleable Castings Corp., Providence, R. I. (now known as Grinnell Corporation).

Continuing, the examiner stated that Luria is the dominant member of a group of three scrap brokers or exporters which had a similar understanding with an organization known as OCCF, the buying agency for European steel mills affiliated with the European Coal and Steel Community. Under this agreement, the Luria group acted as the exclusive or substantially exclusive broker and supplier to these mills of scrap originating in the United States and certain contiguous areas.

These exclusive agreements, he held, are unfair methods of competition prohibited by the FTC Act because, among other things, they suppress competition in both interstate and foreign commerce, enable the respondents to dominate and manipulate various markets in which scrap is purchased and sold, tend to give Luria a monopoly in the purchase and sale of scrap in interstate and foreign commerce, lessen competition between steel mills in purchasing scrap, prevent Luria's competitors from selling to the principal scrap consumers in certain areas, and coerce or cause suppliers of scrap to sell to Luria without regard to the comparative services and facilities offered by Luria and its competitors.

While Luria was a substantial factor in the scrap business around 1945, the examiner stated, its influence was restricted largely to the Eastern United States. However, in the succeeding years it became a dominant factor in other sections of the country. Likewise, in the eastern part of the U. S., where it was a major but not necessarily dominant company, it began to out-distance its competitors until by the middle 1950's it was far and away the dominant factor in the scrap business there.

In 1947, Luria supplied about 17% of the scrap purchased from brokers and dealers by the steel mills comprising approximately 98% of the nation's ingot capacity, but increased its share of such sales to better than 33⅓% in both 1953 and 1954. This increase, Examiner Lewis found, was due mainly to the increase in Luria's sales to the respondent mills. Its share of scrap purchased by these mills

from brokers and dealers increased from about 35% in 1947 to 78% in 1954.

The evidence proves, he said, "that aided in large measure by the exclusive arrangements which it has with the respondent mills [most of which were entered into between 1946 and 1951] Luria has become the most important single factor in the scrap industry in the United States, and the only company which is truly national in scope. In some sections of the country it enjoys monopoly or near monopoly power, and in others it is the dominant or major factor in the area. In certain sections, through its exclusive access to the principal mill or mills, it holds the power of life or death over the dealers operating within the area. It can reward or punish dealers, and deprive competing brokers of access to sources of scrap."

In his detailed findings on the relationship between Luria and each of the respondent mills, the examiner cited specific instances where various mills eliminated other brokers or dealers as suppliers, required them to ship through Luria, dealt with Luria on an exclusive or substantially exclusive basis, and gave Luria higher prices and other preferential treatment.

Turning to the exclusive arrangement with the OCCF, he said there can be no question that until December 21, 1955, it gave the Luria group "a tight monopoly on substantially all scrap exports to the OCCF countries from the United States and other areas in the Western Hemisphere. During these two years [1954 and 1955] the shipments of the Luria group accounted for 90.4% and 95.3%, respectfully, of all scrap shipped to the OCCF countries from the United States. Even after the contract had expired, and at least during the first four months of 1956, the OCCF in practice continued to favor the Luria group to the extent of 82.1% of the scrap imported from the United States."

After citing shipping figures showing the magnitude of the scrap involved in the OCCF exclusive, the examiner stressed that "Luria's access to European markets of the substantial size above indicated gave it considerable economic power in buying in the United States, particularly when coupled with similar arrangements with a number of importrant domestic mills. The two sets of arrangements were mutually reciprocal. As the major or dominant supplier to the mills in the Eastern United States, it was to Luria's interest to prevent any undue disturbance of the domestic supplies or prices of scrap. This

fitted in with the needs of the OCCF, which was interested in buying in such a manner as not to upset the domestic mills, lest this result in a reimposition of export controls or an increase in the price of scrap which it had to pay. An exclusive arrangement involving the buyer for the principal European consumers of domestic scrap and the broker acting as exclusive broker for many of the principal American mills, particularly those in the Eastern United States, could not help but further restrict competition in the domestic market."

In support of his ruling that the Pueblo and Southwest acquisitions are unlawful, Examiner Lewis pointed out that Pueblo "was one of the largest dealers in the Rocky Mountain Area at the time its stock was acquired by Luria in 1946, and its acquisition was of material aid to Luria in carrying out its exclusive arrangement with CF&I's [Colorado Fuel & Iron] Pueblo plant and in becoming the dominant factor in the market. Southwest was the second largest factor in the Pittsburgh-Youngstown market in 1950 when its stock was acquired by Luria. Its acquisition has materially aided Luria, which was already the largest single factor in the market, in far outdistancing all its other competitors in the market. From a position of supplying 26.2% of the broker-dealer scrap purchased by the principal mills in the area in 1949 Luria, as a result of its acquisition of Southwest, controlled 36% of the same market in 1954. The acquisition also strengthened Luria's position in the industry generally since the Pittsburgh-Youngstown market is one of the most important in the country, accounting for approximately one-fourth of the broker-dealer scrap purchased by the principal mills in the United States. Luria's acquisition of the stock of Pueblo Compressed Steel and Southwest Steel was calculated to result in a substantial lessening of competition between it and each of these two companies, and to restrain competition in the markets where it and they both did business, and tended to create a monopoly in Luria."

On the other hand, the examiner dismissed, for failure of proof, charges that four other acquisitions by Luria violate the antimerger law. The acquired concerns are A. M. Wood and Co., Inc., Philadelphia, Pa.; Lipsett, Inc., New York City; Lipsett Steel Products, Inc., Brooklyn, N. Y.; and Apex Steel and Supply Co., Chicago, Ill., and an affiliate, Cermack-Laflin Corp.

The initial decision also would dismiss the complaint as to Hugo Neu Corp., 31 Nassau St., New York City, which is engaged in the

import-export business. Neu and Luria were charged with unlawfully restraining trade by entering into a combination to act as the exclusive or substantially exclusive supplier for five Japanese steel producers.

> "There is no record basis for concluding that, insofar as Neu alone was concerned, its agreement with the Japanese mills had or was likely to have any adverse competitive effect, either on the domestic market or the export scrap market," the examiner found. "Insofar as Luria is concerned, since it had no exclusive arrangement with the Japanese mills, there is no taint of illegality attached to the fact that it shipped substantial quantities of scrap under Neu's contract, during the first seven months of 1954. There is no evidence that Neu entered into the original arrangement with the Japanese mills on Luria's behalf, or in contemplation of Luria's becoming a party to the agreement. The mere fact that Luria, at Neu's request, thereafter agreed to supply unspecified quantities of scrap and to share in the profits, does not make it a party to any exclusive arrangement. Moreover, in the light of the relative quantities of scrap involved and the limited duration of the arrangement, there is no basis for any finding that Luria's participation was calculated to restrain competition in any relevant market."

The examiner also ordered dismissal of allegations that the mills conspired among themselves to use Luria as their exclusive broker, and that Luria and the respondent mills, separately or in combination, unlawfully used a variety of other unfair practices, including these: coercing railroads to sell scrap to Luria, selling new steel on condition that the resulting scrap will be sold to Luria, tie-purchases of scrap, purchasing scrap at preclusive prices, operation of punitive scrap yards, and making loans and advances to scrap dealers on condition that they will sell their scrap to Luria.

"In general," he said, "the evidence fails to support the [other] charges. It may be observed, however, that while the charges have not been sustained, the evidence concerning certain of the practices discloses the economic power which the exclusive arrangements with the mills have conferred upon Luria, and the anti-competitive potentialities of the arrangements."

For example, he pointed out that while the evidence fails to disclose Luria engaged in the practice of paying "prices for scrap so high that it could only be resold at a loss" the fact that Luria was sometimes "able to outbid competitors is indicative of the economic power conferred on it by the exclusive arrangements. Since it was assured of a home for substantial quantities of scrap as a result of the exclusive arrangements with the mills, it was in a position, where necessary, to bid more strongly for scrap than competitors who were not similarly favored."

F. T. C. v. *The Goodyear Tire & Rubber Co. & The Firestone Tire & Rubber Co.* (FTC Dkt. #6486 & 6487, Ceases Desist Orders and Remand, March 15, 1961).

The contracts between the nation's two largest manufacturers of rubber products and two major oil producers under which the latter are paid commissions in return for promoting the manufacturers' automotive tires, batteries and accessories (TBA) are illegal, the Federal Trade Commission ruled in decisions announced.

The concerns involved are:

> (D. 6486) The Goodyear Tire & Rubber Co., the No. 1 rubber company, and its wholly owned subsidiary, The Goodyear Tire & Rubber Co., Inc., both of Akron, Ohio; and The Atlantic Refining Co., Philadelphia, Pa.
>
> (D. 6487) The Firestone Tire & Rubber Co., Akron; and Shell Oil Co., New York City.

In separate opinions by Chairman Earl W. Kintner, the Commission said that the evidence conclusively establishes the sales commission contracts between Atlantic and Goodyear, Atlantic and Firestone, Shell and Firestone, and Shell and Goodyear "have unlawfully injured competition in the distribution of TBA at the manufacturing, wholesale and retail levels."

The FTC issued orders requiring the respondents to discontinue these unlawful arrangements both among themselves or with any other companies.

In taking this action, the Commission modified and supplemented initial decisions by Hearing Examiner Earl J. Kolb. Although finding that Shell and Atlantic used coercion or intimidation to force their dealers to buy sponsored Firestone and Goodyear TBA, the examiner

did not hold that the sales commission contracts themselves are illegal. His order would have required the two oil companies to discontinue their coercive or intimidating activities and would have dismissed the 1956 complaints as to the tire manufacturers.

[At the same time, the FTC remanded to Examiner Kolb a companion case in which he had issued a similar initial decision: D. 6485—The B. F. Goodrich Co., Akron; and The Texas Co., New York City. The record in this case does not contain sufficient market data for an informed determination of the competitive effects of the sales commission method of distributing TBA employed by these respondents, the Commission ruled. It directed the examiner to receive further evidence on this point and to indicate any changes he may then wish to make in his initial decision.]

According to the opinions, under the contracts Shell and Atlantic are paid a 7½% or 10% commission by Firestone and Goodyear for assistance in obtaining TBA orders from their service stations or other dealers. These payments are made monthly to the two oil companies, which incur no expense in connection with the financing, warehousing, or delivery of the items. Monthly reports furnished by the tire companies enable Shell and Atlantic to determine the volume of sponsored TBA purchases by individual dealers.

In 1955, Atlantic was paid $506,199 by Firestone and $557,559 by Goodyear on purchases of $5,562,936 and $5,700,121, respectively. From 1950 to 1957 Firestone's sales to Shell outlets jumped from $12 million to $21 million while Goodyear's rose from $13 million to $26 million. By 1957 these two rubber companies were paying Shell more than $3.5 million commission annually on their combined sales of $47 million.

The Commission upheld the examiner's finding that Shell and Atlantic have coerced dealers to buy sponsored TBA. However, it continued, "we regard these overt acts of coercion as mere symptoms of a more fundamental restraint of trade inherent in the sales commission itself. The more dramatic and immediate impact of this system, to be sure, is upon retail service station dealers of Shell [and Atlantic] and other oil company dealers similarly situated. Their freedom to buy and sell as independent merchants is shown to be less complete in practice than in theory. Yet from the point of view of the antitrust laws, it is the devastating competitive effects of the

sales commission system on competitors of Firestone and Goodyear which raise the most grave questions" in these proceedings.

One prime advantage received by Firestone and Goodyear from these contracts is their participation with each oil company's sales force in joint merchandising programs, the opinion pointed out. Local Firestone or Goodyear supply points are notified of the names and addresses of new dealers before they actually take over operation of their stations. Consequently, this is before local competitors of Firestone and Goodyear become aware of a new dealer's identity.

Demonstrating the importance of this advance notification is the fact that the initial stocking order of TBA may cost as much as $3,000, and dealer turnover is high.

There are numerous other joint merchandising programs favorable to rubber companies having sales commission programs, the FTC continued. For example, Shell participates on a cost-sharing basis with Firestone in "Banner Day" promotions when Firestone products are promoted extensively at Shell stations. Atlantic coordinates special Goodyear promotional programs with its own radio, television and other advertising. Shell and Atlantic make their credit card facilities available on purchases of sponsored TBA. Also, both participate in the most effective joint merchandising tactic—joint solicitation or "double-teaming." In this, a Shell or Atlantic salesman accompanies a Firestone or Goodrich salesman in calls upon service station operators to urge them to buy sponsored TBA.

Cited in the opinions were internal documents by officials of various respondents indicating that Shell and Atlantic salesmen are almost indispensable in selling Firestone and Goodyear TBA to the oil companies' dealers. One reason for this might be that the evaluation by Shell and Atlantic salesmen of dealers is a large factor when decisions are made on extending dealers' leases for another year, the Commission noted.

It added that although both oil companies have tried vigorously to create an image of the typical lessee-dealer as a stoutly independent businessman, able to close up shop as a Shell or Atlantic lessee on Saturday night and reopen down the street in some other oil company's station the following Monday morning, "the record as a whole suggests that this is a romanticized picture of a small businessman who is, more often than not, in a woefully weak bargaining position vis-a-vis his oil company lessor."

The following facts were given to explain the typical lessee-dealer's dependence upon his lessor-supplier: Few men who become operators have the large amount of money necessary to construct a modern service station. Most marketing oil companies, therefore, build a substantial portion of their own stations and lease them to operators. The lessee-dealer uses his own capital to buy an initial inventory of petroleum products, TBA, small tools, and for other expenses incurred in commencing operations. Most operators never manage to purchase the stations they lease.

"But no matter how long an operator may remain as lessee, and no matter how much effort he may make to establish good-will in his community, the time may come when his lease is not renewed—for any one of a number of reasons or for no reason at all except that the lessor would prefer to have someone else operate that particular service station," the FTC pointed out.

Discussing the adverse competitive effects the sales commission plan has at the manufacturing, wholesale and retail levels, the Commission said in the opinion in Docket 6486:

> "Firestone dealers are foreclosed from Atlantic outlets in regions assigned to Goodyear, and Goodyear dealers are foreclosed from Atlantic outlets in regions assigned to Firestone. Even within regions assigned to Goodyear, or to Firestone, only those Goodyear or Firestone dealers fortunate enough to be nominated as 'supply points' have any prospect of sales to Atlantic dealers. Wholesale TBA dealers representing other tire manufacturers, for example United States Rubber Company, Lee Rubber and Tire Corporation, and Mansfield Tire and Rubber Company testified to their inability to sell tires to Atlantic service station dealers, except upon an occasional 'pick-up' basis when a motorist demands a tire brand other than the locally-sponsored offering available at the station."

In its opinion in Docket 6487, the FTC found that "the competitive inequalities engendered by the sales commission plan extend backward to the manufacturing level as well as forward to the retail level. As has been shown, although the smaller tire manufacturers are able to compete with the larger ones in selling to oil companies using the purchase-resale method of distribution, such smaller manu-

facturers are *not* able to compete with the larger ones for the business of oil companies using the sales commission plan. This is chiefly because the smaller manufacturers lack the widespread distributive facilities of Firestone, Goodyear, and other nation-wide tire manufacturers using the sales commission plan. In any particular or specific local market area, to be sure, one or more of the smaller manufacturers may have a wholesale and retail distributing organization which is every bit as effective as its larger competitors in that particular market. Throughout the *entire* marketing area of any large oil company, however, no one of the smaller manufacturers may have as effective a distributive organization as the larger manufacturers. But, as one of the chief characteristics of the sales commission plan is that it strengthens wholesale and retail distributors of such companies as Firestone and Goodyear by pre-empting for their benefit a substantial segment of all the various local wholesale markets throughout the land, the sales commission system stands as a bar to the *expansion* by smaller tire manufacturers of their distributive organizations. For according to Shell, about 45 percent of all replacement TBA items sold to motorists are accounted for by service stations."

F. T. C. v. *Sunshine Biscuits, Inc.* (FTC Dkt. #7708, Init. Dec., March 9, 1961).

In an initial decision, a Federal Trade Commission hearing examiner ruled that the extra discounts Sunshine Biscuits, Inc., Long Island City, N. Y., gave only to certain retail customers, including new customers, were not illegal because they were a good faith meeting of competition.

The examiner, William L. Pack, issued an order which would dismiss the FTC's complaint of Dec. 22, 1959, charging that these discounts were price discriminations which may substantially lessen competition or tend to create a monopoly in violation of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act.

This case involves sales of Sunshine's "Krun-Chee" potato chips in the Cleveland, Ohio, area, the examiner said. There are five principal potato chip distributors in this area, Sunshine ranking fourth with 7.9% of sales. The three companies ahead of it account for 45.6%, 31.6% and 9.6%, respectively.

It is undisputed, the examiner continued, that at various times during a period of some three years—June 1957 to May 1960—Sun-

shine gave some retailers discounts not granted to their competitors. Four retail grocery or drug chains (Marshall-Miller Drug Stores, Pick-N-Pay Supermarkets, Foodtown Supermarkets and Fazio Markets) received discounts of 5% plus another 2%. However, fifteen other customers listed in a stipulation between counsel received only 5%. By May 1960, Sunshine and all other major potato chip distributors in the Cleveland area had discontinued all discounts, substituting advertising or promotional allowances. Counsel had stipulated that Sunshine's discounts may "injure, destroy or prevent competition" between recipients and non-recipients.

Sunshine relied upon the defense of meeting competition in good faith provided to sellers in Section 2(b) of the statute.

Contending that this defense is not available to the company in the case of new purchasers, FTC counsel took the position that Sunshine might lawfully meet a competitor's lower price to retain an old customer but could not meet a lower price to obtain business from a new customer.

Discussing the cases cited to support this position, Examiner Pack said:

> "It appears, however, that the precise question here presented was not before the Supreme Court at all in either of the Standard Oil decisions. As for the Standard Motor Products case, the facts there involved were so far removed from the facts present here that the decision is of extremely doubtful value as authority in the present case. There the court had under consideration pricing practices which were found to be inherently discriminatory and unlawful."

Here, he pointed out:

> "there is nothing inherently wrong in respondent's pricing practices. On the contrary, respondent was doing nothing more than trying to protect itself in a highly competitive market. Competition in the sale of potato chips in the Cleveland market at this time was extremely sharp—'cut-throat,' 'dog-eat-dog,' to use the expressions of some of the witnesses. Certainly, respondent was not required to stand by helplessly and abandon all attempts to obtain new customers merely because in order to do that it was necessary to meet lower prices actually being granted

or offered by its competitors. The statute imposes no such hardship.

"* * * In support of his position, it is ably urged by Commission counsel that in order for a seller to avail himself of the defense provided by Section 2(b) of the statute his actions must be defensive rather than aggressive. But were not respondent's actions here essentially defensive? As already pointed out, respondent was seeking to protect itself in a highly competitive market. It either had to meet its competitors' prices or forego any attempt to obtain the business. Any difference between the situation here presented and one in which the seller is already serving the purchaser is a difference in degree only, not in principle.

"* * * Under Section 2(b) a seller has a complete defense to a charge of price discrimination if he can show 'that his lower price * * * to *any purchaser* or purchasers was made in good faith to meet an equally low price of a competitor * * *' (Emphasis supplied.) There is an entire absence of any requirement that the purchaser must already be a customer of the seller.

"* * * In summary, it is concluded that respondent has established a valid defense under Section 2(b) of the statute; that in granting the lower prices challenged by the complaint it was meeting in good faith equally low prices of competitors; and that respondent was entitled to take such action not only with respect to customers whom it was already serving but also with respect to new customers."

F. T. C. v. *Marcal Paper Mills, Inc., et al.* (FTC Dkt. #8293-5, Complaints, March 13, 1961).

Charges that three manufacturers of grocery items have paid discriminatory promotional allowances to favored customers were announced by the Federal Trade Commission.

Cited in the FTC's separate complaints are:

Marcal Paper Mills, Inc., East Paterson, N. J., a manufacturer of waxed paper, paper towels, napkins and other household paper products. (8293)

Robilio & Cuneo, Memphis, Tenn., the manufacturer of "Ronco" macaroni, spaghetti, and egg noodles. The firm is the

partnership of Albert F. and Rose Ann Robilio, John S. Robilio, Jr., Mrs. John S. Robilio, Sr., Florence Rita Radogna, Roane Waring, Jr., and Martha Cuneo Reid. (8294)

Royal Crown Cola Co., Columbus, Ga., a manufacturer of carbonated beverages, and beverage powders and concentrates. (8295)

The complaint in each case alleges that the company has paid advertising allowances to some customers without making them available on proportionally equal terms to all other competing customers, as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

For example, the complaints say, in 1960 Winn-Dixie Stores, Inc., a retail grocery chain headquartered in Jacksonville, Fla., received preferential payments of $1,474.30 from Royal Crown, $250 from Robilio & Cuneo, and $200 from Marcal.

Notes

Acting under a law used only once since its passage in 1914, Attorney General Robert F. Kennedy asked the Federal Trade Commission to find out if defendants in 56 past antitrust cases are living up to the judgments against them.

Mr. Kennedy described the cases as major ones in the antitrust area since 1940. He said they involved price-fixing, illegal allocation of markets, and orders for large corporations to break up into smaller ones.

Mr. Kennedy said:

> "This law was passed by Congress as part of the basic structure of the laws against monopoly. We found that it has been used only once since 1914. This was astonishing to me.
>
> "It seems to me that a greater effort should be made to secure enforcement of judgments and to insure compliance. We have found an unused tool. We plan to use it."

The only time the law has been used was in 1952, Mr. Kennedy said. No action resulted.

Mr. Kennedy made the application in a letter to Paul Rand Dixon, chairman of the FTC.

Mr. Kennedy wrote Dixon:

> "It is hoped that utilization of this procedure may inaugurate a new era of cooperation between the Department of Justice and the Federal Trade Commission and of more effective enforcement of antitrust decrees."

The law on which his action was based is Section 6c of the Federal Trade Commission Act. It requires the FTC to make such investigations "upon the application of the Attorney General."

Mr. Kennedy said:

> "If the FTC's investigations should disclose that any of these defendants are not complying with the court judgments against them, we'll seek contempt citations."

He did not identify any of the defendants.

The law under which Mr. Kennedy acted is as follows:

15 U. S. Code 46a

> "The (Federal Trade) commission shall also have power—
>
> "whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation and the report shall be made public in the discretion of the commission."

Following is the text of the Attorney General's letter to the Federal Trade Commission:

> Honorable Paul Rand Dixon
> Chairman
> Federal Trade Commission
> Washington 25, D. C.
>
> Dear Mr. Dixon:
>
> In accordance with the provisions of Section 6(c) of the Federal Trade Commission Act (15 U. S. C. §46(c)) appli-

cation is hereby made to the Federal Trade Commission for an investigation of the manner in which the judgments in the attached list of cases have been and are being carried out.

For the purposes of such investigations, representatives designated by the Federal Trade Commission to make the investigations are hereby duly authorized to act as representatives of the Department of Justice pursuant to the sections of the respective judgments giving certain visitation and interview rights. Supplemental written authorization will be provided for such representatives upon request of the Commission by the Assistant Attorney General in charge of the Antitrust Division.

As you are aware, the statute hereby invoked has been virtually unused since its enactment in 1914. There are, therefore, no precedents or liaison procedures established for this reference. It is suggested that you instruct the appropriate members of your staff to communicate directly with the Assistant Attorney General in charge of the Antitrust Division, or other members of the antitrust staff, and secure such additional information and formulate such liaison procedures as will best permit the discharge of the respective functions of our agencies as appear to be contemplated by the statute.

It is hoped that utilization of this procedure may inaugurate a new era of cooperation between the Department of Justice and the Federal Trade Commission, and of more effective enforcement of antitrust decrees.

Sincerely,

Robert F. Kennedy
Attorney General

Paul Rand Dixon, Chairman of the Federal Trade Commission, acknowledged that the Commission received a request from Robert F. Kennedy, the Attorney General, under the provisions of Section 6(c) of the Federal Trade Commission Act, to undertake an investigation of the manner in which the judgments in some fifty-six cases have been carried out.

The Chairman welcomed the inauguration of a new era of cooperation between the Department of Justice and the Federal Trade

Commission. "I agree," he said, "with the Attorney General that a more effective enforcement program of antitrust decrees must be achieved. Doubt in any area as to the effectiveness of decrees which have been rendered in the antitrust field should be resolved:

> "In undertaking this program a considerable increase in the staff of the Federal Trade Commission certainly is needed. However, in view of the importance of this undertaking, I am confident the Commission will receive the fullest co-operation in obtaining the funds necessary to execute and fulfill this obligation. I am confident that the results which can be achieved through this program will fully justify whatever expense may be involved in developing these facts."

Paul Rand Dixon Takes Oath of Office as FTC Chairman

Paul Rand Dixon of Tennessee on March 21, 1961 became Chairman of the Federal Trade Commission.

The 47-year-old Democrat and former Counsel and Staff Director of the Senate Antitrust and Monopoly Subcommittee was administered the oath of office by his friend and fellow Tennessean, Judge Samuel Whittaker of the U. S. Court of Claims.

Present at the ceremony, held in Room 532 of the FTC Building, were Mrs. Dixon, the former Doris Busby, a college classmate at Vanderbilt University, and their two sons, David Leslie, 13, and Paul Randall, Jr., 10, and Mr. Dixon's mother, Mrs. Sarah Munn Dixon of Nashville, Tenn. Also attending were top officials of the FTC and personal friends of Mr. Dixon, including members of Congress with whom he has worked as staff director of Senator Estes Kefauver's antitrust subcommittee.

Participating in the ceremony was retiring FTC Chairman Earl W. Kintner, Republican.

Mr. Dixon, whose nomination by President Kennedy was confirmed by the Senate last Thursday, will commence a term of office to expire Sept. 25, 1967. As Commission Chairman, he will be the agency's chief administrative officer as well as performing the quasi-judicial function of a Commissioner.

Mr. Dixon brings to the Commission experience gained as a staff member, having joined the Commission as a trial attorney in July 1938 and serving, except for the war years, in both antideceptive

practice and antimonopoly work. In February 1957, he accepted the Senate Subcommittee post and thereafter assisted the Subcommittee in developing and focusing attention of the Congress and the public on a large number of important and difficult problems in the field of restraints of trade. These included administered prices in many major industries including steel, automobiles, oil, bread and drugs.

The son of James David Dixon (deceased) and Sarah Munn Dixon, both native-born Tennesseans, Mr. Dixon was born Sept. 29, 1913 at Nashville, Tenn. He attended public schools in Davidson County, then entered Vanderbilt University where he earned his A.B. degree in 1936. He also was varsity quarterback on the Vanderbilt football team. The next two years he was assistant football coach for the University of Florida during which time he earned his law degree there.

Mr. Dixon served with the U. S. Navy from 1942 to 1945. Commissioned a Lieutenant (j.g.) he served on the staff of Chief of Naval Operations. He then went overseas as assistant to the Commanding Officer, Naval Operating Base, Palermo, Sicily. He served 23 months overseas and participated in the occupation of Africa and in the invasion and occupation of Sicily. He is entitled to wear three battle stars and is presently Lieutenant Commander, U. S. N. R. (Ret.).

Mr. Dixon is a Methodist, a Mason, a member of the A. T. O. college social fraternity, the Alumni Board of Directors of Vanderbilt University, and Kenwood (Md.) Country Club.

Bill Will Be Introduced to Promote Small Business Participation in Export Markets, Senator John Sparkman announced. Titled "The National Export Policy Act of 1961," the measure is an "amended and amplied version of S. 852," introduced on February 9, 1961, by Senator Jacob K. Javits. A key feature of the bill is a strengthened program of export credit guarantees by the Export-Import Bank. The measure is an outgrowth of hearings held by the Committee in November and December of 1960 on "Small Business Exports and the World Market."

The new Export Policy bill would:

"(1) Authorize and encourage the Export-Import Bank of Washington to broaden the export-credit-guarantee program in order to include short-term commercial-risk guarantees, and other

types of coverage and generally to step up its activities in this field.

"(2) Create a Foreign Trade Division in the Small Business Administration to aid small businessmen in entering export markets and improving and expanding their export operations. The division would also represent American small business at international trade-agreement negotiations in which the U. S. is a participant.

"(3) Authorize and direct the Department of State to undertake 'market surveys and other commercial research' in foreign countries and to disseminate the information gained thereby to American businesses; to insert institutional advertising for American exports, general and specific, in foreign media; and, in cooperation with the Department of Commerce, to set up U. S. trade information centers at permanent and temporary trade fairs in other countries.

"(4) Authorize and direct the Department of Commerce to expand export services in its field offices and increase the number of field offices; to insert export promotion advertising in American media; to set up, in cooperation with the State Department, permanent trade centers abroad for the exhibition of U. S. goods; to build warehouses and other support facilities abroad in aid of American exporters; and to increase the number of trade missions sent abroad annually.

"(5) Create a Council for Export Promotion, made up of sub-cabinet officers and heads of independent Federal agencies, including the Small Business Administration, to coordinate governmental export services.

"(6) Create an Advisory Committee on Export Promotion, made up of representatives of various sectors of the private business community, to consult with and advise the Council for Export Promotion."

In stating that he expects within the next few days to file the Committee's report on its study of small business exports, Senator Sparkman said:

"The Export Policy Act will make unmistakably clear for all time that Congress intends for the Export-Import Bank to provide this country's exporters with export credit guarantees, against both commercial and political risks in both short- and medium-term transactions, which are competitive in all regards with the best of the foreign credit guarantee facilities."

The Senate Small Business Committee Members who are cosponsoring the National Export Policy Act are Senators Sparkman, Javits, Long of Louisiana, Humphrey, Smathers, Morse, Bible, Randolph, Engle, Williams of New Jersey, Moss, Saltonstall, Schoeppel, Cooper, Scott, and Prouty. Senators Case of New Jersey and Keating, cosponsors of the earlier Javits bill, are also cosponsoring the Sparkman-Javits measure.

Hearings Held on S. 836, a Bill to Amend the Small Business Act of 1958. In an opening statement, Senator William Proxmire, author of the bill and Chairman of the Subcommittee on Small Business of the Committee on Banking and Currency, stated: "Something must be done to permit small business, on its own merits, to participate in our vast procurement effort. Something must be done to stop the growing trend to concentrating our Federal contracting programs in a few large enterprises to the exclusion of many competent smaller firms whose existence is not only vital to our economy but to our system of open competition."

The major and most controversial provision of S. 836, Section 8, would empower the Small Business Administration, after consultation with the Defense Department, the General Services Administration, and the Atomic Energy Commission, to promulgate a small business subcontracting program. A limited clause states that "no program shall prescribe the extent to which any contractor shall enter into subcontracts, or specify the business concerns to which subcontracts shall be granted."

As an alternative to the "promulgating" authority, John E. Horne, SBA Administrator, suggested that SBA shall "cooperatively develop . . . small business subcontracting programs" with the procuring agencies, with the procuring agencies having the final word on the shape of the programs.

Senator Sparkman, in comments on this statement, said: "It always irritates me a little bit to find our Government agencies con-

trolled so much by the Budget . . . I am rather of the opinion that we have a statement that was prepared by the same people that have been running the Budget Bureau during the last eight years . . . I just do not see how we can get very far with this kind of proposal unless we get help directly from the President . . . and the Secretary of Defense . . ."

Section 8 is opposed by the Defense Department. Some business representatives testified in favor of it and some against it.

In addition to providing for a subcontracting program, S. 836 would accomplish the following:

1. Increases SBA's business loan revolving fund by $75 million.

2. Permits SBA to report to the President and to Congress annually instead of every six months.

3. Causes the Commerce Department to publish daily a larger percentage of procurement actions; namely, most military contracts over $10,000 and all civilian contracts of more than $5,000.

4. Extends beyond June 30, SBA's authority to make loans to State and local development companies.

5. Instructs the Attorney General to report not less than once a year on any activity of the Government which may affect small business. The SBA Administrator may also request the Attorney General to make supplemental surveys and reports.

6. Authorizes SBA to examine the procurement files and records of Government agencies.

At the conclusion of the hearings on March 17, Senator Proxmire announced that the record would be left open for 15 days.

John V. Buffington Named Assistant to FTC Chairman

The appointment of John V. Buffington of Clifton, Va., as Assistant to the Chairman of the Federal Trade Commission was announced by Chairman Paul Rand Dixon.

Mr. Buffington, who is 52, has served the Commission for 18 years, advancing from a trial attorney to Assistant General Counsel

in charge of the Division of Special Legal Assistants for the past nine years.

The appointment is the first Chairman Dixon has made since taking office last Tuesday.

Prior to having become Assistant General Counsel, Mr. Buffington had engaged in essentially the same work as Special Legal Assistant to the Commission from 1947 to 1952. This work involved research and legal help to the Commission in the preparation of formal opinions and other legal documents.

Mr. Buffington first joined the Commission staff in 1941 as a trial attorney, and a year later became legal assistant to Commissioner Edwin L. Davis. Here Mr. Buffington remained until he entered the U. S. Navy in 1944, where, assigned to the Office of Chief of Naval Operations, he earned the rank of Lieutenant, U. S. N. R. Returning in 1946 to the Commission as a trial attorney, he became Special Legal Assistant a year later.

Mr. Buffington was born in Castleberry, Ala., in 1908, the son of John T. (now deceased) and Deda Martin Buffington. He attended elementary school in Opp, Ala., and high school in Greenville, Ala., before entering the University of Alabama from which he obtained a B.A. degree in 1929 and his Law Degree (with honors) in 1932. He obtained his Masters Degree in law from George Washington University in Washington, D. C. in 1938.

He entered law practice in 1932 in Meridian, Miss., with the firm of Gabe Jacobson, and a year later became an attorney for the Federal Land Bank in New Orleans, La., where he remained until 1941, except for a year in 1937-1938 during which he served with the Farm Credit Administration in Washington.

BOOK REVIEW

Clair Wilcox, *Public Policies Toward Business,* Revised Edition, Richard D. Irwin, Inc., Homewood, Illinois, pp. xiv + 907.

Very few economists can write with greater authority on the subjects contained in this text than Professor Clair Wilcox. His knowledge is extensive and encompasses a wide range of historical, motif of the text. On page ix he states that the general theme of legal, political, and factual materials—as well as economic concepts which are not pure. His able, albeit one-sided book, is intended to convey information and a wealth of description, rather than provoke thought, to students in economics and political science courses.

In the preface, the author describes aptly and concisely the central the book " . . . is an appraisal of the comparative merits and demerits of these (public) policies, in the light of past experience, from the standpoint of their consequences for the general welfare."

This purpose is admirably fulfilled by the author, an economist who apparently would like to improve situations which are economically unsound. Due to his natural sympathies (see p. x), he is, at times, carried away by the ardor of convictions which are merely specified rather than argued.

The book is divided into several sections, considering, in turn, laws for maintaining competition, laws for moderating competition, laws for replacing competition by regulation, and the subject of public enterprises—in the approximate ratios of four, two, three, and one, respectively. The introductory part of the book is followed by a lengthy section which attempts—and very competently, too—to take stock of antitrust law and litigation. This section presents a detailed and systematic account of governmental antitrust policies toward private enterprise, as well as laws on legal monopolies. The discussion is quite comprehensive and includes an impressive array of information, with equal conviction. The central traditions of antimonopoly legislation are analyzed by summarizing the laws and their interpretations, and by viewing antitrust as a rule of law designed to serve political and social ends as well as economic principles. The discussion is reasonably well balanced, factually and logically, and I cannot fault it. The God's-eye view included in the summary chapter provides an evaluation of antitrust policies.

The third section of the book includes chapters on antitrust departures and exemptions, control of natural resources, subsidization, agriculture, and labor. Some institutions and state activities are omitted, and justifiably so. Generally, portions of this section would be loose, tedious, and tiresome were it not for the author's successful stimulation of interest by the constant infusion of new insights into old subjects.

The fourth section deals with public utility policies; the regulation of transportation, radio, and television; and peacetime and wartime controls with the state acting as a protector, promulgator, or partner. A minor drawback of this section, considering the number and complexity of the topics included, is its abbreviated layout, in particular with regard to public utility economics.

The final section of the book touches upon public enterprises. In many respects, this is the least commendable part of the book. The author makes circuitous progress, often breaking off the discussion at points where further elucidation would be desirable.

When viewed as a whole, the book, designed primarily as a reference text, is not a disappointment. It is written in a fluent and unlabored manner—it is easily readable. There is much of value in it, and little effort is required to glean the important information therein contained. The first edition of the book has already become —and rightfully so—an important text in its field, a part of the mainstream of teaching.

One minor criticism stems from interpersonal differences in tastes.

As the book explicitly deals with legal, political, and economic institutions, it is not proper to note its omission of theory (with a few exceptions, as in Chapter 10). Also, from the point of view of the economist interested in industrial organization and public policy, the book has an imbalance of economic theory, legal considerations, administrative facts, and political techniques. The material presented is meant to be descriptive and factual, rather than formalistic or theoretical, with no actual discussion of the relation of public policy to economic theory or the reconciliation of experience and theory. In addition, while many economists share the definite biases and preferences of the author, they argue that normative judgments usually involve postulates about economic objectives—that is to say, theory is implied in judgment. For, to many economists beliefs are

based upon theoretical analyses, and it would have been reassuring if the author's descriptions had been related to a theoretical framework and his conclusions drawn from a direct analysis.

In this reviewer's opinion, this is a slight omission in an otherwise excellent textbook in its field.

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